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In The Supreme Court of the United States

CHRISTOPHER SCOTT HUGHES AND
THOMAS PORTER CLOYD,

Petitioners,

v.

CHARLIE CRIST, ATTORNEY GENERAL OF
THE STATE OF FLORIDA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Whether federal preemption in this matter is facially conclusive pursuant to *New Orleans Pub. Ser, Inc. v. Council of the City of New Orleans*, 491 U.S. 350, 109 S.Ct. 2506, 105 L. Ed. 2d 298 (1989), such that the federal courts should not abstain in this matter.

2. Whether the abstention doctrine stated in *Younger v. Harris*, 401 U.S. 37, 91 S. Ct. 746; 27 L. Ed. 2d 669 (1971), is applicable in matters where the Petitioners have exhausted all state court remedies on the preemption question prior to petitioning the federal courts.

LIST OF PARTIES

The Petitioners Christopher Scott Hughes and Thomas Porter Cloyd are the defendants in a state court criminal proceeding pending in the Circuit Court of the Eleventh Judicial Circuit of Florida in and for Miami-Dade County, Florida. Hughes and Cloyd filed their Petition for Writ of Habeas Corpus in the United States District Court for the Southern District of Florida.

The Respondent Charlie Crist is the Attorney General of the State of Florida and was one of the Respondents named in the Petition for Writ of Habeas Corpus. Attorney General Crist was the Appellant in the proceedings before the United States Circuit Court of Appeals for the Eleventh Circuit.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit, review of which is sought by this petition, is reported at 377 F.3d 1258 (11th Cir. 2004), and is reproduced in the appendix ("App.") at A-1 to A-34. The Order granting the Petition for Writ of Habeas Corpus of the United States District Court for the Southern District of Florida (Seitz, D.J.) is reported at 274 F.Supp. 2d 1334 (S.D. Fla. 2003), and is reproduced at B-1 to B-27.

JURISDICTION

The opinion of the United States Court of Appeals for the Eleventh Circuit was entered on July 21, 2004. The Supreme Court of the United States has jurisdiction of this cause pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Supremacy Clause of Article VI of the Constitution of the United States is reproduced in the Appendix hereto as C-1.

The following pertinent provisions of the United States Code are reproduced in the Appendix as D-1 to D-5: 18 U.S.C. §§ 341-43, 49 U.S.C. § 44701, 49 U.S.C. § 45106;

The following pertinent provisions of the Code of Federal Regulations are reproduced in the Appendix hereto as E-1: 14 C.F.R. pt. 121 App. I § XI, 14 C.F.R. pt. 121 App. J (I)(E).

The following pertinent provisions of the Florida Statutes are reproduced in the Appendix hereto as F-1 to F-2: Fla. Stat. § 860.13, Fla. Stat. § 316.193(1).

STATEMENT OF THE CASE

This is a petition for writ of certiorari to review a decision of the Eleventh Circuit wherein the Court of Appeals found that preemption was not facially conclusive pursuant to *New Orleans Pub. Serv., Inc. v. Council of the City of New Orleans*, 491 U.S. 350 (1989), despite the fact that the First and Third Circuits have found that Congress has preempted the field of aviation safety and the express preemption statement contained in 14 C.F.R. pt. 121 App. I § XI.

There are no relevant material facts in dispute for the purposes of this petition:

On July 1, 2002, Hughes and Cloyd were employed as First Officer and Captain, respectively, for America West Airlines, Inc. R2-23-2. America West Airlines is a State of Delaware corporation operating scheduled interstate commercial air service pursuant to 14 C.F.R. § 121.1 et seq. of the Federal Air Regulations; it is an "air carrier" within the definition of 49 U.S.C. § 40102(a)(2); and it is an "air common carrier" as defined in 18 U.S.C. § 341. At all times pertinent to this action, Hughes and Cloyd were duly certified airmen holding Air Transport Pilot certificates issued by the Federal Aviation Administration pursuant to 14 C.F.R. § 61.151 et. seq., and were operating in that capacity pursuant to 14 C.F.R. § 121.1 et. seq.

On that day, First Officer Hughes and Captain Cloyd boarded America West Airlines Flight 566 in preparation for a scheduled commercial flight from Miami, Florida to Phoenix, Arizona. R2-23-2.[1] Shortly thereafter, officers from the Miami-Dade County Police Department contacted the

[1] The designation "R" refers to the record in the U.S. Court of Appeals for the Eleventh Circuit.

Transportation Security Administration, a division of the Department of Homeland Security, and asked for permission to recall Flight 566 based upon a tip from security guards that the pilots smelled of alcohol. R2-23-3. Air traffic control then recalled Flight 566 to the gate. R1-3-Ex.E.

Miami-Dade County police officers detained the pilots and then transported Hughes and Cloyd to the police station and, approximately two hours later, administered alcohol breathalyzer tests. R3-26-8. According to the State of Florida, Hughes and Cloyd had alleged breathalyzer results of .084 and .081 (Hughes) and .091 and .090 (Cloyd). R2-23-3. Those alleged results exceed the 0.08 limit under Florida's motor vehicle law, exceed the 0.04 federal regulatory limit for civil sanctions, but are below the federal criminal presumption of 0.10 contained in 18 U.S.C. §343. R1-2-8. Shortly thereafter, America West Airlines fired Hughes and Cloyd, and the Federal Aviation Administration permanently revoked their airmen and medical certificates in civil administrative proceedings. R3-26-9. The State of Florida charged the pilots criminally with operating a vehicle while intoxicated, operating an aircraft while intoxicated, and culpable negligence. R1-3-Ex.B. At no time does the State of Florida contend that there was any actual loss of life, injury or damage to property.

A. State Court Proceedings

The Petitioners were charged by the State of Florida with violations of Florida Statute section 860.13 for allegedly operating an aircraft while intoxicated and section 316.193(1) for operating a motor vehicle (in this case, an Airbus 319 commercial aircraft) while intoxicated. R1-3-Ex. A. The State later amended its Information to include one count of culpable negligence. R1-3-Ex.B. All of these charges directly relate to the physical capacity and

qualifications of Hughes and Cloyd to pilot a commercial aircraft in interstate commerce. R1-3-Ex.B.

On September 4, 2002, Hughes (later joined by Cloyd) filed a Motion to Dismiss the Information for Lack of Subject Matter Jurisdiction. R1-3-Ex.C. The motion asserted that state regulation of the physical capacity and qualifications of airmen piloting commercial aircraft in interstate commerce is preempted by Congress and the regulations promulgated by the Federal Aviation Administration. After hearing argument on the motion, the state trial court denied the motion. R1-3-Ex.D.

On October 30, 2002, Hughes and Cloyd filed a Petition for Writ of Prohibition in Florida's Third District Court of Appeal, asserting the same preemption grounds argued before the trial court. R1-3-Ex.E.[2] After hearing oral argument on the matter, the Third District denied the Petition for Writ of Prohibition without written opinion, with Third District Judge John G. Fletcher dissenting. R1-3-Ex.F. As no written opinion was issued by the Third District, the Florida Supreme Court lacked jurisdiction to hear the matter and, as a result, the Third District's order stands as the decision of the highest court of the State of Florida with jurisdiction to hear the matter and is the law of the case. R2-23.

Hughes and Cloyd then filed their Petition for Writ of Habeas Corpus in the United States District Court for the Southern District of Florida. R1-1. After the submission of memoranda and oral argument by the parties, the District Court granted the petition, directed the State of Florida to discharge Hughes and Cloyd, quashed the state criminal

[2] In the State of Florida, a party may bring petition for writ of prohibition in a state appellate court to concurrently contest the subject matter jurisdiction of a lower court over a matter pending before it. See Fla. R. App. P. 9.100.

proceedings, and enjoined the state from taking further action in this matter. R2-23-16.

B. The District Court Opinion

In its Order granting the Hughes' and Cloyd's Petition for Writ of Habeas Corpus, the District Court held that "federal law preempts state law in the area of pilot qualifications and capacity to operate commercial aircraft in interstate commerce where there is no actual loss of life, injury, or damage to property." R2-23-16. The court emphasized the narrowness of its holding, stating that its decision "does not preclude a state from pursuing a criminal prosecution where a commercial airline pilot's actions result in actual loss of life, injury, or damage to property." R2-23-17.

The court determined that the pervasiveness of the federal government's legislation and regulation in this area show that it has occupied the field to the exclusion of state law. In particular, the court explained that 49 U.S.C. §44701 demonstrates "Congress' clear intent to empower the FAA to regulate the airline transportation industry to ensure safe flights." R2-23-11. The court observed that, pursuant to its grant of authority from Congress, the FAA "has promulgated extensive regulations in the area of commercial pilot qualifications, including pilot licensing (14 C.F.R. § 61.1 et seq.), pilot medical requirements (14 C.F.R. § 67.1 et seq.), pilot conduct (14 C.F.R. § 91.1 et seq.), operating requirements (14 C.F.R. §§ 121.1 et seq. & 135.1 et seq.), and the misuse of alcohol on duty (14 C.F.R. §§ 135.253 & 121.458)." R2-23-11.

The District Court stressed that "Congress has made it a federal crime for pilots to operate commercial aircraft with a blood alcohol concentration of 0.10 or more," R. 2-23-11 (citing 18 U.S.C §§ 341-43), and that the FAA has

"promulgated regulations imposing criminal penalties for specified violations of the Federal Aviation Act or any related regulations." R2-23-12 n.17 (citing 14 C.F.R. §13.23). The District Court concluded that "because of the dominant federal interest in uniformity of pilot qualification regulation, the goals of Congress in creating the FAA, and the pervasive FAA regulatory scheme, it is readily apparent that the federal government has preempted the field of pilot qualifications in regularly scheduled commercial interstate flights where there is no actual loss of life, injury or damage to property." R2-23-16.

Moreover, the District Court held that the federal government has expressly preempted the state laws at issue here. Specifically, the court pointed to the express preemption provision of 14 C.F.R. pt. 121, Appendix I, § XI.

The District Court then observed that "[t]he plain language of this regulation expressly preempts all state criminal laws governing incidents that do not involve 'actual loss of life, injury, or damage to property,' and are covered in 14 C.F.R. parts 65, 121, or 135." R2-23-15. Thus, as Hughes and Cloyd were acting pursuant to part 121 at all times pertinent to this action, the court concluded that "it is readily apparent that the federal government's preemptive regulation expressly prevents the State from criminally prosecuting Hughes and Cloyd." R2-23-16. The State of Florida, by and through Attorney General Charlie Crist, appealed the District Court's decision.

C. Eleventh Circuit Decision

The United States Court of Appeals for the Eleventh Circuit reversed the District Court and, citing *New Orleans Pub. Serv., Inc. v. Council of the City of New Orleans*, 491 U.S. 350 (1989), held that because preemption was not "facially conclusive" the District Court should have abstained from hearing the Petition for Writ of Habeas Corpus. In reaching the determination that preemption was not "facially conclusive" in this matter, the Eleventh Circuit adopted principles in opposition to those stated in decisions finding field preemption in aviation matters by the First and Third Circuits. Similarly, the Eleventh Circuit expressed the confusion among the Circuit Courts, and the direct conflict between the Fifth and Ninth Circuits, in regard to scope and breadth of the express preemption provision contained in 14 C.F.R. pt. 121 App. I § XI.

D. Concurrent Federal and State Criminal Proceedings

On July 8, 2004, immediately prior to the issuance of the Eleventh Circuit's ruling in this matter, the United States indicted the Hughes and Cloyd under 18 U.S.C. § 341. This criminal proceeding is currently pending in the United States District Court for the Southern District of Florida and is set for trial in December 2004. The pending state criminal matter is set for trial in February 2005.

REASONS FOR GRANTING THE PETITION

The question of whether federal preemption of the physical qualifications and capacity of federally certified airmen operating commercial aircraft in interstate commerce is facially conclusive, pursuant to *New Orleans Pub. Serv., Inc. v. Council of the City of New Orleans*, 491 U.S. 350 (1989) ("*NOPSI*"), is the object of conflict and confusion among the Circuit Courts of Appeal. In *NOPSI*, the Court

stated that abstention as set forth in *Younger v. Harris*, 401 U.S. 37 (1971), may be appropriate in matters where federal preemption is facially conclusive. *NOPSI*, 491 U.S. at 366

This issue has a substantial impact on the uniform system of air commerce regulations in the United States. Both Congress and the Federal Aviation Administration have enacted extensive regulatory schemes for the certification of individuals to operate aircraft in the United States. However, to the small subset of federally certified airmen who are entrusted to operate commercial aircraft, the Federal Aviation Administration has enacted a much more detailed and restrictive set of regulations that are applicable only to these individuals and not to all pilots in general. These regulations include several explicit preemption statements and these statements were reinforced by Congress's enactment of 49 U.S.C. § 45106. The individual state governments have historically had no role in determining or regulating the physical qualifications and capacity of commercial airmen and have no regulatory schemes in place to determine the physical qualifications or capacities of these federally certificated airmen.

I. Conflict And Confusion Exist In The Circuit Courts Of Appeal Concerning The Nature And Scope Of Federal Preemption Of Federally Certificated Airmen Operating Commercial Aircraft In Interstate Commerce

The decision of the Eleventh Circuit conflicts decisions of the First and Third Circuit Courts of Appeal on the issue of field preemption and with the Fifth Circuit on applicable the express preemption provision. This conflict has created confusion such that the Eleventh Circuit was unwilling or unable to find that preemption in this area was facially conclusive. The decision of the Eleventh Circuit was reached even though the First and Third Circuits have held

that the field of air safety has been preempted by Congress and the Federal Aviation Administration. Additionally, the conflict between the Fifth and the Ninth Circuits on the scope and breadth of the express preemption provision contained in Appendix I to 14 C.F.R. pt. 121 creates confusion about the state regulations that are actually preempted by the provision.

A. The Determination that Field Preemption is not Facially Conclusive in this Matter Conflicts in Principle with Decisions of the First and Third Circuits

Two Circuit Courts of Appeal, the First Circuit in *French v. Pan Am Express, Inc.*, 869 F.2d. 1, 3 (1st Cir. 1989). and the Third Circuit, in *Abdullah v. American Airlines, Inc.*, 181 F.3d 363, 367 (3d Cir. 1999), have determined that the field of air safety has been preempted by Congress and the regulations promulgated by the Federal Aviation Administration. Preemption of state law has its genesis in the Supremacy Clause of the Constitution: "This Constitution and the laws of the United States which shall be made in pursuance thereof . . . shall be the supreme Law of the land; and the Judges in every State shall be bound thereby, any thing in the Constitution or Law of any State to the contrary notwithstanding." U.S. Const. art. VI, cl. 2. The intent of Congress is the 'touchstone' of preemption analysis. *Cipollone v. Liggett Group*, 505 U.S. 504, 516 (1992) (*citing Malone v. White Motor Corp.*, 435 US 497, 504, 55 L. Ed. 2d 443, 98 S.Ct. 1185 (1979)). "Congress' intent may be 'explicitly stated in the statute's language or implicitly contained in its structure and purpose.' In the absence of an express congressional command, state law is pre-empted if that law actually conflicts with federal law, or if federal law so thoroughly occupies a legislative field 'as to make

reasonable the inference that Congress left no room for the States to supplement it.'" *Cipollone*, 505 U.S. at 516.

Field preemption occurs when: 1) the pervasiveness of the federal regulations precludes supplementation by the States, 2) the federal interest in the field is sufficiently dominant; or 3) the object the federal law seeks to obtain and the character of the obligations federal law imposes reveal the same purpose. *See Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 299, 108 S.Ct. 1145, 99 L.Ed. 2d 315 (1988); *Fidelity Fed. Sav. & Loan Ass'n v. Cuesta*, 458 U.S. 141, 153-54, 102 S.Ct. 3014, 72 L.Ed. 2d 664 (1982). Importantly, "although the term 'field preemption' suggests a broad scope, the scope of a field deemed preempted by federal law may be narrowly defined." *Abdullah v. American Airlines, Inc.*, 181 F.3d 363, 367 (3d Cir. 1999).

Even a brief review of Congressional enactments and regulations promulgated by the Federal Aviation Administration clearly indicates that the federal government has taken the primary role in regulating aviation. *See* 49 U.S.C. § 40101 et seq. and 14 C.F.R. pts. 1-198. The regulations specifically applicable only to airmen operating commercial aircraft in interstate commerce are more numerous and more comprehensive than those applicable solely to private airmen. *See* 14 C.F.R. §. 121.01 et. seq.

The scope of federal regulation of commercial aviation has been evident for over sixty years. As Justice Jackson stated in his concurring opinion in *Northwest Airlines, Inc. v. Minnesota*: "Federal control is intensive and exclusive. Planes do not wander about in the sky like vagrant clouds. They move only by federal permission, subject to federal inspection, in the hands of federally certified personnel and under an intricate system of federal commands." *Northwest Airlines, Inc. v. Minnesota*, 322 U.S. 292, 303, 64 S.Ct. 950, 88 L.Ed. 1283 (1944).

Congress has charged the Administrator of the FAA with the responsibility to promote safe flight of civil aircraft in air commerce. 49 U.S.C. § 44701. The delegation of power to the Administrator in section 44701 is "as deep as it is wide." *French v. Pan Am Express, Inc.*, 869 F.2d. 1, 3 (1st Cir. 1989). In furtherance of this responsibility, the FAA has promulgated an extensive and comprehensive regulatory scheme, including airmen licensing requirements (14 C.F.R. § 61.1 et seq.), medical requirements (14 C.F.R. § 67.1 et seq.), general conduct requirements applicable to all airmen (14 C.F.R. §. 91.1 et seq.), and specific requirements regulating the commercial airmen and operations of regularly scheduled airlines (14 C.F.R. § 121.1 et seq.) and commuter airlines (14 C.F.R. § 135.1 et seq.). The more specific regulations applicable only to commercial airmen operating under part 121 include those governing the use of alcohol found in 14 C.F.R.§ 121.458, 14 C.F.R. pt. 121 App. I, and 14 C.F.R. pt. 121 App. J.

Congress's intent to create a single uniform system for the regulation of air commerce is evident. As the First Circuit stated in *French*: "The regulation of interstate flight – and flyer – must of necessity be monolithic. Its very nature permits no other conclusion. In the area of pilot fitness as in the area of aviation noise, the Act as we read it 'leave[s] no room for . . . local controls." *French*, 869 F.2d at 6 (citing *City of Burbank v. Lockheed Air Terminal*, 411 U.S. at 638). Additionally, the "establishment of a single uniform system of regulation in the area of air safety was one of the primary 'object[s] sought to be obtained' by the passage of the act." *French*, 869 F.2d at 3 (quoting *Schneidewind*, 108 S.Ct. at 1150).

The First Circuit's findings in *French* were echoed by the Third Circuit in *Abdulluh v. American Airlines, Inc*, 181 F.3d 363 (3d Cir. 1999), when it stated that the aviation

industry "is the only one whose operations are conducted almost wholly within federal jurisdiction, and are subject to little or no regulation by States or local authorities." *Abdullah*, 181 F.3d at 368.

The Congressional intent to occupy the field of the physical capacity and qualifications of commercial airmen operating in interstate commerce, including alcohol use, is further evidenced by the fact that Congress has enacted a specific federal criminal prohibition applicable, among other categories, only to those airmen who fly for an air common carrier. *See* 18 U.S.C. §§341-43.

In its decision below, the Eleventh Circuit chose not to find field preemption. Rather, the Eleventh Circuit declined to follow the principles adopted by the First and Third Circuits. The Eleventh Circuit based its decision that field preemption is not facially conclusive in this matter on the existence of one regulation that falls within the general regulations applicable to all airmen, not the more comprehensive and restrictive regulations applicable only to commercial airmen operating in interstate commerce. *See Hughes v. Attorney General of Florida*, 377 F.3d 1258, 1268 (11th Cir. 2004).

The section cited prominently by the Eleventh Circuit in its decision to show that preemption is not facially conclusive, 14 C.F.R. § 91.17, is contained within Subchapter F of the Title 14 of the Code of Federal Regulations. The regulations contained in Subchapter F, titled Air Traffic and General Operating Rules, are the generally applicable rules for all airmen. However, there is a vast regulatory difference between these generally applicable rules and the rules specifically set forth in Subchapter G – Air Carriers and Operators for Compensation or Hire. Subchapter G, the home of part 121, contains a more detailed

and thorough set of qualifications and standards than those that are otherwise applicable for airmen in general.

Furthermore, the Eleventh Circuit's opinion misconstrues the clear intent of Congress contained in the express preemption provision of 49 U.S.C. §45106(a). Rather than reading the statute as one having preemptive effect on state regulation, which the title and the wording of the section clearly indicate, the Eleventh Circuit states that the section could rather be read as "a mere explanation that Congress did not intend that the Federal Aviation Act or its regulations would be inconsistent with state laws imposing sanctions for reckless conduct leading to loss of life, injury, or damage to property." *Hughes v. Attorney General of Florida*, 377 F.3d at 1269.

Thus, despite the fact that the First Circuit found that Congress had intended to preempt the field in *French* and the Third Circuit's conclusion in *Abdullah* that "the entire field of aviation safety is federally preempted." *Abdullah*, 181 F.3d at 375, the Eleventh Circuit did not find that preemption was facially conclusive in this matter.

B. A Conflict Between the Fifth Circuit and the Ninth Circuit about the Preemptive Effect of the Express Preemption Provision of 14 C.F.R. pt. 121 App. I § XI has caused the Eleventh Circuit Confusion as to Whether the Express Preemptive Language of a Federal Regulation is Facially Conclusive

In addition to field preemption, the federal government has expressly preempted state action on matters concerning the physical qualifications and capacity to operate commercial aircraft in interstate commerce. The federal government's express intention to preempt state action on matters involving alcohol and federally certified

commercial airmen operating pursuant to the regulations prescribed in 14 C.F.R. § 121.01 et seq. is clear, unambiguous, and facially conclusive.

In reaching its decision, the Eleventh Circuit arrived at the following two conclusions: 1) "It is not absolutely clear that the challenged Florida statutes cover the same 'subject matter of 14 C.F.R. Parts 65, 121, and 135."; and 2) That other regulations promulgated by the FAA are "in substantial tension with" a non-narrow reading of the preemptive nature of Appendix I.

On the first point, the Eleventh Circuit disregards the breadth and scope of the 'subject matter' of 14 C.F.R. pt. 121 by focusing only on Appendix I to that part. The subject matter of part 121 is not, as the Eleventh Circuit suggests in its narrow interpretation, "drug testing." Rather, part 121.1 clearly sets forth that it applies to, among other entities, "each person who is onboard an aircraft being operated under this part." 14 C.F.R. § 121.1(e).

The undisputed facts in this matter show that Hughes and Cloyd were, at all times, operating in their capacity pursuant to part 121. The plain language of the statement of preemption contained in section XI of Appendix I is clear and facially conclusive.

Secondly, the Eleventh Circuit failed to draw the distinction between federally certified commercial airmen operating pursuant to part 121 and general aviation pilots operating under the general rules and requirements of Title 14. Once again, the Circuit Court gave great weight to the notion that preemption was not facially conclusive due to the fact that 14 C.F.R. § 91.17 indicates that Congress has contemplated some state action regarding pilots and alcohol use. The Petitioners have never asserted, and do not contend here, that the federal government has preempted action state

regulation against private pilots flying non-commercial aircraft in intrastate flight. Rather, Congress and the Federal Aviation Administration determined that it was important to have different classifications of airmen and that different rules and regulations would be applicable to each of these classifications. Airmen with greater responsibility in interstate commerce are subject to more detailed and strenuous federal regulations. At the very pinnacle of this rating system are the women and men who operate regularly scheduled commercial aircraft in interstate commerce. It is at this level that the most detailed regulations exist and it is at this level that the federal government has preempted state action.

Finally, in the decision below, the Eleventh Circuit sided with the Ninth Circuit in opposing the Fifth Circuit's analysis of the scope and breadth of the preemptive language contained in Appendix I. In *Frank v. Delta Airlines*, 314 F.3d 195 (5th Cir. 2002), the Fifth Circuit noted that "the narrow savings language implied a broad scope for federal preemption, since an exception for state criminal laws would hardly have seemed necessary if state law were only narrowly preempted." *Frank* 314 F.3d at 199. However, the Ninth Circuit adopted an opposing and narrower interpretation of this language in *Ishikawa v. Delta Airlines*, 343 F.3d 1129 (2003). The Ninth Circuit "rejected the invitation to read the preemptive language of Appendix I broadly, relying in part upon the conflicting indications in 49 U.S.C. § 45106(a) and other provisions of the federal regulations." *Hughes v. Attorney General of Florida*, 377 F.3d. at 1274 fn. 21.

The need to resolve this conflict among the Circuit Courts of Appeal on the issues of field and express preemption in this matter is apparent as it has created confusion about the scope of federal preemption applicable

in this area. This confusion has manifested itself in the case at bar.

The Eleventh Circuit, while not affirmatively stating its position in this matter, instead stated that the conflict among the Fifth and Ninth Circuits leads to the conclusion that express preemption is not facially conclusive in this matter. The conflicting interpretations of this express preemption provision by the Fifth and Ninth Circuits, along with the Eleventh Circuit's reliance on that conflict of the scope of this language, undermines the uniformity that is vital to the function of the regularly scheduled commercial aircraft service in the United States.

C. Preemption is Facially Conclusive due to the Direct Conflict Between the Federal Standard and the State Laws at Issue in this Matter.

Federal Preemption is facially conclusive in this matter due to the direct conflict between the standard established by the federal government for the criminal prosecution of airmen operating commercial aircraft while intoxicated. The Eleventh Circuit misapplied the standard for analyzing conflict preemption issues and, thus, improperly found that preemption was not facially conclusive.

> If Congress has not entirely displaced state regulation over the matter in question, state law is still preempted to the extent it actually conflicts with federal law, that is, when it is impossible to comply with both state and federal law, . . ., or where the state law stands as an obstacle to the accomplishment of the full purpose and objectives of Congress . . .

Silkwood v. Kerr-McGee Corp., 464 U.S. 238, 248 (1984) *See also Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142 (1963) ("The test of whether both federal and state regulations may operate, or the state regulation must give way, is whether both regulations can be enforced without impairing the federal superintendence of the field, not whether they are aimed at similar or different objectives.")

The state statutes in question stand as an obstacle to the accomplishment of the full purposes and objectives of Congress in creating a single uniform system of regulation for airmen operating commercial aircraft in interstate commerce. Included in the extensive regulatory framework is a specific federal criminal standard for operating a commercial aircraft while intoxicated. *See* 18 U.S.C. §§ 341-43. The Eleventh Circuit implied that if it is possible to be in compliance with both the federal standard and the state standard, then there would be no conflict. *Hughes*, 377 F.3d at 1266 n. 11. Conflict preemption in this case is facially conclusive when one considers that the standard under federal criminal law, together with the civil penalties for lesser amounts, reflects the balance that Congress has struck between the imposition of criminal and civil penalties, while maintaining aviation safety in interstate commerce. This is evident in the congressional record of the enactment of the federal criminal standard where it is clear that Congress intended a criminal intoxication standard of .10 for a criminal penalty in interstate commerce. *See Hearing Before the Senate Committee on the Judiciary on Senate Bill 850 – September 30, 1985.*

Accordingly, conflict preemption of the subject state statutes is facially conclusive given the specific federal standard and clear purposes and objectives of Congress in establishing a

single uniform system of regulation in this area and the state statutes conflict with the federal standards.

II. The State Courts Have Fully and Finally Ruled On The Preemption Issue In This Matter And Thus Equity And Comity Are Not Served By The Federal Courts Abstaining

The principles that underlie the *Younger* abstention doctrine do not require the federal courts to abstain in this matter as the state courts have fully and finally ruled on the preemption issue in this matter. The *Younger* abstention doctrine is based on the principle of comity between the federal and state systems. *Younger v. Harris*, 401 U.S. 37, 44-45 (1971).

However, the abstention doctrine was not intended to restrict federal courts from acting until the absolute conclusion of all state proceedings. Rather, it was intended to preserves the role of the state courts in the application and enforcement of federal law. *See Braden v. 30th Judicial Circuit Court of Kentucky*, 410 U.S. 484, 490, 93 S. Ct. 1123, 1127, 35 L. Ed. 2d 443, 449 (1973). This purpose has been achieved in this matter and abstention is thus not appropriate.

No issue of comity is served by having an individual tried in a state court when the very state law at issue is void under the Constitution. "Comity would not be realistically furthered by requiring trial on the merits when the federal claims which may avoid conviction have already been subjected to the fullest scrutiny and most definitive disposition of the [state] court." *Neville v. Cavanagh*, 611 F.2d. 673 (6th Cir. 1979) (Cudahy, C.J. dissenting).

In this matter, Hughes and Cloyd have fully and finally exhausted all of their state court remedies on the preemption issue prior to filing their petition in the District Court. The highest court in the State of Florida with the jurisdiction to determine this matter has ruled and that decision stands as the law of the case. During oral argument before the Eleventh Circuit, the State of Florida affirmed that the state courts will not revisit this issue.

In fact, the principles of federalism and comity in this matter are served by recognizing that the State of Florida has set forth a judicial procedure, through a writ of prohibition proceeding, to fully rule on questions of subject matter jurisdiction prior to a trial on the matter. The State of Florida does not require that a trial be held prior to determining this issue and thus the federal courts should defer to the state's handling of this type of question and not abstain from deciding the issue once the highest court of the state has fully and finally ruled. As Judge Cudahy stated in his dissent in *Neville*, the federal court would be following the lead of, not usurping or interfering with, the state courts by determining this matter now. *Neville*, 611 F.2d at 678.

CONCLUSION

For the foregoing reasons, the Petitioners respectfully request that the Court grant the Petition for Writ of Certiorari.

APPENDICES

A. Opinion of the U.S. Court of Appeals for the Eleventh Circuit (July 21, 2004) A-1
B. Opinion of U.S. District Court for the Southern District of Florida B-1
C. Constitutional Provision C-1
D. U.S. Code Provisions D-1
E. Code of Federal Regulations Provisions E-1
F. State Code Provisions F-1

*377 F.3d 1258, *; 2004 U.S. App. LEXIS 15059, **; 17 Fla. L. Weekly Fed. C 783*

CHRISTOPHER SCOTT HUGHES, THOMAS PORTER CLOYD, Petitioners-Appellees, versus ATTORNEY GENERAL OF FLORIDA, Charlie Crist, Respondent-Appellant, AIR LINE PILOTS ASSOCIATION, Amicus Curiae.

No. 03-14122

UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

377 F.3d 1258; 2004 U.S. App. LEXIS 15059; 17 Fla. L. Weekly Fed. C 783

July 21, 2004, Decided
July 21, 2004, Filed

PRIOR HISTORY: **[**1]** Appeal from the United States District Court for the Southern District of Florida. D. C. Docket No. 03-21300-CV-PAS. **Hughes v. Eleventh Judicial Circuit of Fla., 274 F. Supp. 2d 1334, 2003 U.S. Dist. LEXIS 13585 (S.D. Fla., 2003)**

DISPOSITION: Reversed and remanded.

COUNSEL: For ATTORNEY GENERAL OF FLORIDA, Appellant: Polin, Richard L., Miami, FL; Kise, Christopher M., Christopher M. Kise, P.A., Tallahassee, FL.

For HUGHES, CHRISTOPHER SCOTT, Appellee: Freeman, Jeffrey L., MIAMI, FL.

For CLOYD, THOMAS PORTER, Appellee: Lindsey, Harold Eugene, Ferrell, Schultz, Carter, Zumpano & Fertel, P.A., Miami, FL; Rubin, James K., Law Offices of Barry T. Shevlin, N MIAMI BEACH, FL.

For AIR LINE PILOTS ASSOCIATION, INTERNATIONAL, Amicus Curiae: Anker, Jerry D., Washington, DC.

JUDGES: Before ANDERSON, HULL and PRYOR, Circuit Judges.

OPINIONBY: ANDERSON

OPINION:

[*1260] ANDERSON, Circuit Judge:

This case involves two airline pilots who have been charged with violating Florida criminal statutes prohibiting the operation of an aircraft while intoxicated. Prior to the commencement of the state criminal trial, and after making pre-trial motions in that case, the pilots filed the instant action in the United States District Court for the Southern District of Florida seeking pretrial habeas relief from their pending criminal trial in state court. They assert that the Florida statutes at issue are preempted by federal law; they seek, inter alia, to enjoin the state criminal proceedings. The district court, after determining that it should not abstain from deciding the case, agreed with the pilots that both express and field preemption preempted the Florida criminal statutes at issue. The Florida Attorney General appealed the district court's grant of habeas relief. Because we

find the preemption claims in the instant case are not facially conclusive, we reverse **[**2]** the district court; we hold that the district court should have abstained.

I. FACTS AND PROCEDURAL HISTORY

On the morning of July 1, 2002, Christopher Scott Hughes and Thomas Porter Cloyd (appellees), America West pilots at the time, reported to America West Flight 566 for a flight from Miami to Phoenix. Upon passing through a security checkpoint at Miami International Airport, officials smelled alcohol on appellees. The officials subsequently reported this to the Miami-Dade County Police. Appellees, in the meantime, boarded Flight 566, and after performing pre-flight checks and the boarding of passengers, the pilots pushed away from the terminal at Miami International Airport. However, before takeoff, the pilots were instructed to taxi back to the gate, whereupon they were interviewed by Miami-Dade police officers, and approximately two hours later were taken **[*1261]** to a Miami-Dade police station where the officers administered breathalyser tests to both appellees. The breathalyser results were 0.084 and 0.081 breath alcohol level for Hughes and 0.091 and 0.090 breath alcohol level for Cloyd. Appellees were subsequently charged with operating an aircraft while intoxicated, [1] operating **[**3]** a vehicle while intoxicated, [2] and culpable negligence under Florida state law. Prior to their criminal trial in Florida state court, appellees filed motions to dismiss both of the informations for lack of subject matter jurisdiction on the basis of

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[1] Fla. Stat. § 860.13.

[2] Fla. Stat. § 316.193(1).

federal preemption, which the state trial court denied. Appellees then pursued the matter through the Florida appellate courts. The parties agree that the issue has been exhausted.

Appellees then filed a pre-trial petition for writ of habeas corpus in the United States District Court for the Southern District of Florida. Appellees claimed that federal law preempted the Florida state statutes under which appellees were being prosecuted and therefore the district court should, inter alia, enjoin the state criminal proceedings.

The district court granted appellees the relief they sought, directing the State of Florida to discharge appellees, quashing the **[**4]** state criminal proceedings, and enjoining the State of Florida from taking any further action in the matter. Hughes v. Eleventh Judicial Circuit of Fla., 274 F. Supp. 2d 1334, 1336 **(S.D. Fla. 2003)**. The district court decided that abstention would be inappropriate in the present case. Id. at 1340. After citing the general rule, announced in Younger v. Harris, 401 U.S. 37, 46, 91 S. Ct. 746, 751, 27 L. Ed. 2d 669 (1971), that federal courts should not interfere with pending state court criminal proceedings, the district court went on to discuss an exception to this rule - that a federal court may intervene in extraordinary circumstances, such as when a state statute is found to be "flagrantly and patently violative of express constitutional prohibitions in every clause, sentence and paragraph, and in whatever manner and against whomever an effort might be made to apply it." Hughes, 274 F. Supp. 2d at 1340 (quoting Younger, 401 U.S. at 53-54, 91 S. Ct. at 755). The district court, citing Baggett v. Dep't of Prof'l Regulation, 717 F.2d 521, 524 (11th Cir. 1983), noted that this Circuit

has [**5] held that such intervention is permitted where a petitioner demonstrates that federal preemption of state law is "readily apparent." Hughes, 274 F. Supp. 2d at 1340. The district court then determined that the preemption of the state law in the present case is readily apparent, and thus it was appropriate to intervene. Id. The district court concluded that federal law preempts state law in the area of pilot qualification and capacity to operate regularly scheduled commercial flights in interstate commerce, and that the instant Florida criminal statutes fell within this category, and thus were preempted. Id. at 1346.

II. HABEAS REVIEW

The present habeas petition was initially brought pursuant to 28 U.S.C. § 2254. However, because this petition for habeas relief is a pre-trial petition it would only be properly asserted pursuant to 28 U.S.C. § 2241. See Medberry v. Crosby, 351 F.3d 1049, 1060 (11th Cir. 2003), cert. denied, 158 L. Ed. 2d 714, ___ U.S. ___, 124 S. Ct. 2098 (2004) ("State pre-trial detention, for example, might violate the Constitution [**6] or the laws or treaties of the United States. Yet a person held in such pre-trial detention would not be 'in custody pursuant to the judgment of a State court.' Such a prisoner would file [*1262] an application for a writ of habeas corpus governed by § 2241 only."); Stacey v. Warden, Apalachee Corr. Inst., 854 F.2d 401, 403 n.1 (11th Cir. 1988) ("Pre-trial habeas petitions . . . are properly brought under 28 U.S.C. § 2241, which applies to persons in custody regardless of whether final judgment has been rendered."). Even though the district court applied the standards appropriate for § 2254 petitions, instead of dismissing appellees'

petition as improperly brought pursuant to § 2254, we will treat appellees' petition as if brought pursuant to § 2241(c), and review the petition accordingly. [3] In the present case petitioners have met the exhaustion requirements necessary to obtain relief pursuant to 28 U.S.C. § 2241. [4]

III. ABSTENTION

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[3] There is recent authority of treating appellees' petition in this manner. See Aquiar v. Tafoya, 95 Fed. Appx. 931, 932 (10th Cir. 2004) (unpublished) ("Although petitioner filed his habeas petition under 28 U.S.C. § 2254, the district court properly construed the petition . . . as challenging the execution of his sentence under 28 U.S.C. § 2241."). See also Dickerson v. State of Louisiana, 816 F.2d 220, 224 (5th Cir. 1987) (construing the pro-se petitioner's petition brought under § 2254 as if brought under § 2241); Fisher v. Rose, 757 F.2d 789, 792 n.2 (6th Cir. 1985) (construing an improper pre-trial § 2254 petition by counseled petitioner pursuant to § 2241).

After appellees go through their state criminal trials they would not be prohibited from bringing a § 2254 habeas petition because they previously brought the claim in a § 2241 pre-trial habeas petition in this case. See 28 U.S.C. § 2244(a). Because we abstain from hearing appellees' claims, there has been no decision on the merits that would prohibit a later § 2254 habeas petition. Id. Of course, it would be necessary for appellees to meet any other requirements for bringing a § 2254 post-trial habeas petition, and we otherwise express no opinion with respect to such a later petition. **[**7]**

[4] In Fain v. Duff, the former Fifth Circuit explained that the exhaustion of state remedies . . . was [originally] left in the discretion of the district court, [but] the requirement soon became known as a jurisdictional one. With respect to collateral attack on convictions in state court, the requirement was codified in 28 U.S.C. § 2254(b), but the requirement applies to all habeas corpus actions.

488 F.2d 218, 223 (5th Cir. 1973). See also Medberry, 351 F.3d at 1060 ("The 1948 codification which created § 2254 merely codified judge-made restrictions on issuing the writ of habeas corpus as authorized under § 2241.").

A. General Standards and the Standard of Review

When a petitioner seeks federal habeas relief prior to a pending state criminal trial the petitioner must satisfy the "Younger abstention hurdles" before the federal courts can grant such relief. Kolski v. Watkins, 544 F.2d 762, 766 (5th Cir. 1977). [5] Therefore, before turning to the preemption issue in earnest, **[**8]** we must first determine whether the district court should have abstained from deciding the present case. We review a Younger abstention decision for an abuse of discretion. 31 Foster Children v. Bush, 329 F.3d 1255, 1274 (11th Cir.), cert. denied, ___ U.S. ___, 124 S. Ct. 483 (2003). However, it would be an abuse of the district court's discretion to apply an inappropriate legal standard or fail to follow the proper procedures in making its determination. Boyes v. Shell Oil Prods. Co., 199 F.3d 1260, 1265 (11th Cir. 2000).

In Younger, 401 U.S. 37, 91 S. Ct. 746, 27 L. Ed. 2d 669, the Supreme Court established that "absent extraordinary circumstances federal courts should not enjoin pending **[**9]** state criminal prosecutions." New Orleans Pub. Serv., Inc. v. Council of **[*1263]** New Orleans, 491 U.S. 350, 364, 109 S. Ct. 2506, 2516, 105 L. Ed. 2d 298 (1989) (NOPSI). This decision was based not on jurisdiction, but on the principles of equity and comity. NOPSI, 491 U.S. at 364, 109 S. Ct. at 2516 (citing Younger, 401 U.S. at 43-44, 91 S. Ct. at 750).

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[5] In Bonner v. City of Prichard, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc), this Court adopted as binding precedent all of the decisions of the former Fifth Circuit handed down prior to the close of business on September 30, 1981.

Federal courts have consistently recognized this limitation on enjoining state criminal prosecutions unless one of a few narrow exceptions is met. [6]

In the present case, the pertinent exception is the exception for irreparable injury. [7] See Younger 401

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[6] In Younger, the Supreme Court set out three exceptions to the abstention doctrine: (1) there is evidence of state proceedings motivated by bad faith, (2) irreparable injury would occur, or (3) there is no adequate alternative state forum where the constitutional issues can be raised. Younger, 401 U.S. at 45, 53-54, 91 S. Ct. at 751, 755.

[7] The Supreme Court has explored this exception more fully in several decisions since Younger. In Kugler v. Helfant, 421 U.S. 117, 123-25, 95 S. Ct. 1524, 1530-31, 44 L. Ed. 2d 15 (1975), the Court stated:

Although the cost, anxiety, and inconvenience of having to defend against a single criminal prosecution alone do not constitute "irreparable injury" in the "special legal sense of that term," [Younger, 401 U.S.], at 46, 91 S. Ct. , at 751, the Court in Younger left room for federal equitable intervention in a state criminal trial where there is a showing of "bad faith" or "harassment" by state officials responsible for the prosecution, id., at 54, 91 S. Ct. , at 755, where the state law to be applied in the criminal proceeding is "'flagrantly and patently violative of express constitutional prohibitions,'" id., at 53, 91 S. Ct. , at 755, or where there exist other "extraordinary circumstances in which the necessary irreparable injury can be shown even in the absence of the usual prerequisites of bad faith and harassment." Ibid. . . .

The policy of equitable restraint expressed in Younger v. Harris, in short, is founded on the premise that ordinarily a pending state prosecution provides the accused a fair and sufficient opportunity for vindication of federal constitutional rights. See Steffel v. Thompson, 415 U.S. 452, 460, 94 S. Ct. 1209, 1216, 39 L. Ed. 2d 505. Only if "extraordinary circumstances" render the state court incapable of fairly and fully adjudicating the federal issues before it, can there be any relaxation of the deference to be accorded to the state criminal process. The very nature of "extraordinary circumstances," of course, makes it impossible to anticipate and define every situation that might create a sufficient threat of such great, immediate, and irreparable injury as to warrant intervention in state criminal proceedings. But whatever else is required, such circumstances must be "extraordinary" in the sense of creating an

U.S. at 46-48, 91 S. Ct. at 751-53. **[**10]** The Supreme Court has noted that irreparable injury may be shown if a state statute is "flagrantly and patently violative of express constitutional prohibitions in every clause, sentence and paragraph, and in whatever manner and against whomever an effort might be made to apply it." [8] Id. at 53-54, 91 S. Ct.

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extraordinarily pressing need for immediate federal equitable relief, not merely in the sense of presenting a highly unusual factual situation.

421 U.S. at 123-25, 95 S. Ct. at 1530-31 (footnote omitted). In Kugler, the Court also discussed the scope of the "other extraordinary circumstances" it referenced, noting that the exception would encompass situations where a state statute was "flagrantly and patently violative of express constitutional prohibitions in every clause, sentence and paragraph, and in whatever manner and against whomever an effort might be made to apply it" or where the state decision maker was incompetent by reasons of bias to adjudicate the issues pending before it. Id. at 125 n.4, 95 S. Ct. at 1531 n.4 (quotation omitted). See also Moore v. Sims, 442 U.S. 415, 433, 99 S. Ct. 2371, 2382, 60 L. Ed. 2d 994 (1979) (discussing how Kugler was the most detailed discussion of the "extraordinary circumstances" that would constitute "irreparable harm" to satisfy the exception to the Younger doctrine). **[**11]**

[8] This Circuit has emphasized the narrowness of this exception to the Younger doctrine. See, e.g., Butler v. Ala. Inquiry Comm'n, 245 F.3d 1257, 1265 (11th Cir. 2001) ("Also, while we today make no decision about the constitutionality of Alabama's judicial canons, we doubt that Canon 7(B)(2) patently or fragrantly violates the Constitution 'in every clause, sentence, and paragraph, and in whatever manner and against whomever an effort might be made to apply it.'") (citation omitted); Kolski, 544 F.2d at 766 ("The statute in this case, challenged as facially unconstitutional by the Petitioner, is certainly of questionable validity. But we certainly cannot say at this stage that this statute is 'flagrantly and patently violative of express constitutional prohibitions in every clause, sentence and paragraph, and in whatever manner and against whomever an effort might be made to apply it.' As in Younger, 'the possible unconstitutionality of a statute "on its face" does not in itself justify an injunction against good-faith attempts to enforce it . . . .'") (citations omitted).

at 755. **[*1264]** Before turning to the application of this exception in the instant case, we must first discuss the Baggett, 717 F.2d 521, decision from this Circuit, as well as the Supreme Court's subsequent decision in NOPSI, 491 U.S. 350, 109 S. Ct. 2506, 105 L. Ed. 2d 298, and how those cases inform our analysis in the instant case.

[12]**

B. NOPSI and Baggett

In Baggett, 717 F.2d 521, this Court addressed the issue of Younger abstention as it relates to federal preemption. We held that the state administrative agency attempting to enforce state regulations upon a tugboat pilot had no competence to proceed because of preemption by federal statutes. Id. at 523-24. Although the district court in Baggett noted that federal statutes and regulations preempted the state regulations at issue in the case, the district court nevertheless concluded that Younger abstention was appropriate because the plaintiff had failed to show irreparable injury would result. Id. at 523. This Court reversed the district court, holding that the preemption in the case was "readily apparent," and that Younger abstention was inappropriate. Id. at 524.

In 1989, several years after this Court's decision in Baggett, the Supreme Court issued its opinion in NOPSI, 491 U.S. 350, 109 S. Ct. 2506, 105 L. Ed. 2d 298, addressing preemption arguments similar to those raised in Baggett. First, the Court rejected the claim that a substantial federal **[**13]** preemption claim would preclude Younger abstention. NOPSI, 491 U.S. at 364-65, 109 S. Ct. at 2516. The Court

specifically noted that there is not any distinction between a claim of federal preemption and any other constitutional challenge to state action as it relates to a State's interest in its own proceedings enforcing or reviewing the state action. Id. at 365, 109 S. Ct. at 2516. The Court reasoned that because a substantial constitutional challenge to state action will not alone compel the exercise of federal jurisdiction there is no reason to treat a substantial federal preemption claim any differently. Id. The Court explained that when the general nature of the underlying state proceedings are appropriate, but a party is merely challenging the state's ability to make a particular action subject to those proceedings, the analytical focus of the challenge is too narrow. Id. at 366, 109 S. Ct. at 2517. The Court compared such a challenge to the one addressed in Younger itself, where the party had contended that First Amendment protections made the subject of his prosecution improper. Id.

The Court then shifted **[**14]** its focus to the "irreparable injury" exception to Younger abstention. The Court noted that "irreparable injury" may be established by showing that the challenged state statute is "'flagrantly and patently violative of express constitutional prohibitions . . . .'" Id. at 366, 109 S. Ct. at 2517 (citation omitted). The Court did not decide whether a federal preemption claim could ever meet the "irreparable injury" exception, and left open the possibility that a "facially conclusive" **[*1265]** claim of preemption would meet this exception. [9] Id.

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[9] The Court concluded it did not need to decide because the proceedings at issue in that case did not establish a facially conclusive claim.

Appellant argues that NOPSI's "facially conclusive" standard applies in the present case, and overruled our decision in Baggett. Regardless of the differences in semantics between the terms "facially conclusive" and "readily apparent," their import is the same: only the clearest of federal preemption claims **[**15]** would require a federal court to hear a preemption claim when there are underlying state court proceedings and when that claim can be raised in the state forum. [10] To the extent that the "readily apparent" standard can be construed to encompass more claims of preemption than a "facially conclusive" standard, the latter must control.

Therefore, the appropriate inquiry is whether appellees' federal preemption claims are facially conclusive, and thus meet the relevant exception to Younger abstention. Because, as discussed below, we determine that appellees' claims of federal preemption are not "facially conclusive," we reverse the district court's decision not to abstain from deciding the present case.

IV. PREEMPTION

A. General Standards

The basis for federal preemption comes from the **[**16]** Supremacy Clause of the Constitution, the second clause of Article VI. This Court recently summarized the various types of federal preemption:

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[10] We again emphasize the narrowness of the exception for a "facially conclusive" preemption claim in that it is derived from the narrow "irreparable injury" exception to Younger abstention. See supra note 8.

Congress's intent to preempt state law may be explicitly stated in the language of a federal statute or implicitly contained in the structure and purpose of the statute. Jones v. Rath Packing Co., 430 U.S. 519, 525, 97 S. Ct. 1305, 1309, 51 L. Ed. 2d 604 (1977). Bearing in mind this distinction between express and implied preemption, the Supreme Court has identified three types of preemption: (1) express preemption; (2) field preemption; and (3) conflict preemption. Wisconsin Public Intervenor v. Mortier, 501 U.S. 597, 604-05, 111 S. Ct. 2476, 2481-82, 115 L. Ed. 2d 532 (1991); This That & The Other Gift & Tobacco, Inc. v. Cobb County, Ga., 285 F.3d 1319, 1322 (11th Cir. 2002). "Express preemption" occurs when Congress has manifested its intent to preempt state law explicitly in the language of the statute. If Congress does not explicitly preempt state law, however, preemption still occurs when federal regulation in a legislative field is so pervasive that we can reasonably infer that Congress **[**17]** left no room for the states to supplement it--this is known as "field preemption" or "occupying the field." English v. General Elec. Co., 496 U.S. 72, 79, 110 S. Ct. 2270, 2275, 110 L. Ed. 2d 65 (1990). And even if Congress has neither expressly preempted state law nor occupied the field, state law is preempted when it actually conflicts with federal law. "Conflict preemption," as it is commonly known, arises in two circumstances: when it is impossible to comply with both federal and state law and when state law stands as an obstacle to achieving the objectives of the federal law. Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363, 372-73, 120 S. Ct. 2288, 2294, 147 L. Ed. 2d 352 (2000).

Cliff v. Payco Gen. Am. Credits, Inc., 363 F.3d 1113, 1122 (11th Cir. 2004). Federal regulations are an important part of the **[*1266]** preemption claims in the present case, and thus, we must keep in mind that federal regulations have no less pre-emptive effect than federal statutes. . . . When the administrator promulgates regulations intended to pre-empt state law, the court's inquiry is . . . limited: "If his choice represents a reasonable **[**18]** accommodation of conflicting policies that were committed to the agency's care by the statute, we should not disturb it unless it appears from the statute or its legislative history that the accommodation is not one that Congress would have sanctioned."

Fidelity Federal Sav. & Loan Ass'n v. de la Cuesta, 458 U.S. 141, 153-54, 102 S. Ct. 3014, 3022-23, 73 L. Ed. 2d 664 (1982) (quoting United States v. Shimer, 367 U.S. 374, 383, 81 S. Ct. 1554, 1560, 6 L. Ed. 2d 908 (1961)). The ability of an administrative agency to preempt state law does not depend on express congressional authorization to displace state law. The proper inquiry is whether the administrative agency intended to preempt state law, and if so, whether the preemption was within the scope of the authority delegated by Congress. Id. at 154, 102 S. Ct. at 3023. Therefore, in looking at the preemptive effect of any of the pertinent federal regulations in the present case, the proper inquiry is 1) whether the FAA regulations preempt the Florida statutes in question here, and, if so, 2) whether that action is within the scope of the FAA's authority.

The district court found both express [**19] preemption and field preemption in the present case, concluding that preemption was readily apparent, and enjoining the state court proceedings. [11] Hughes, 274 F. Supp. 2d at 1343-44, 1346. We disagree. While it is necessary to discuss the particular legal standards governing a preemption analysis, we emphasize that we need not, and do not, resolve the merits of the preemption claims. If upon a review of the preemption claims in question we determine that the claims are not facially conclusive, we need go no further, and should abstain from hearing the claim. As explained below, because the preemption claims put forth by appellees are not facially conclusive, the district court should have abstained from deciding the preemption claims at this time.

[**20]

B. Field Preemption

The district court determined that Congress and the FAA have preempted the field of law governing the qualifications and capacity of pilots who operate commercial aircraft in interstate commerce, such that the challenged Florida criminal statutes are

[11] Neither party seriously contends that conflict preemption is at issue in the present case. Appellees' brief does suggest that 18 U.S.C. §§ 341-43 directly conflict with the Florida criminal statutes at issue. However, appellees admitted at oral argument that the pilots could comply with both the Florida criminal statutes and §§ 341-43 without any problem. Moreover, the state statutes here, criminalizing the operation of commercial airlines while intoxicated, do not stand as an obstacle to the purpose of 18 U.S.C. §§ 341-43 or the federal regulatory scheme, and certainly not in a "facially conclusive" manner. See Crosby, 530 U.S. at 372-73, 120 S. Ct. at 2294. As such, the remainder of our focus will be on the other two types of preemption.

preempted. Hughes, 274 F. Supp. 2d at 1343-44. The district court, in reaching its conclusion that field preemption was "readily apparent," defined the field of preemption: "qualifications and capacity to pilot regularly scheduled commercial flights in interstate commerce where there are no actual fatalities or injuries to persons or property." Id. at 1342. The district court cited various regulations promulgated by the FAA in the area of commercial pilot qualifications such as those covering pilot licensing, pilot medical **[*1267]** requirements, pilot conduct, operating requirements, and regulations governing the misuse of alcohol while on duty. Id. at 1342-43. The district court also cited the promulgation of federal criminal statutes by Congress making it a crime to pilot a commercial aircraft while intoxicated. [12] Id. at 1343. In light of these regulations **[**21]** and statutes, the district court determined it was "readily apparent" that Congress intended to preempt the field of pilot qualifications and capacity to fly a commercial airliner in interstate commerce. Id. at 1344. The district court supported its conclusion by citing French v. Pan Am Express, Inc., 869 F.2d 1 (1st Cir. 1989), and Abdullah v. American Airlines, Inc., 181 F.3d 363 (3d Cir. 1999).

As noted above, field preemption occurs when federal regulation in a field is so pervasive that we can reasonably infer that there is no room left for the states to supplement it. Cliff, 363 F.3d at 1122. However, the Supreme Court has stated that we should not infer field preemption "simply because the agency's regulations are comprehensive." R.J. Reynolds Tobacco Co. v. Durham County, 479 U.S.

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[12] 18 U.S.C. §§ 341-343.

130, 149, 107 S. Ct. 499, 511, 93 L. Ed. 2d 449 (1986) (noting in that case that, while detailed, **[**22]** the federal regulations appeared to contemplate some concurrent state regulation).

Any argument that field preemption in the present case is facially conclusive is severely undercut by 14 C.F.R. § 91.17. The district court cited multiple regulations enacted by the FAA as support for the court's determination that it was "readily apparent" the FAA had occupied the field of regulation of pilot safety and qualifications. Hughes, 274 F. Supp. 2d at 1342-43. However, the district court failed to devote sufficient attention to 14 C.F.R. § 91.17(c). The text of § 91.17(c) provides in pertinent part that,

(c) A crewmember shall do the following:

(1) On request of a law enforcement officer, submit to a test to indicate the percentage by weight of alcohol in the blood, when—

(i) The law enforcement officer is authorized under State or local law to conduct the test or to have the test conducted; and

(ii) The law enforcement officer is requesting submission to the test to investigate a suspected violation of State or local law governing the same or substantially similar conduct prohibited by paragraph (a)(1), (a)(2), **[**23]** or (a)(4) of this section.

14 C.F.R. § 91.17(c). The text of § 91.17(c) would seem to contemplate the enforcement of state laws

regarding the type of conduct outlined in subsections (a)(1), (a)(2), and (a)(4) of § 91.17, which provide,

(a) No person may act or attempt to act as a crewmember of a civil aircraft—

(1) Within 8 hours after the consumption of any alcoholic beverage;

(2) While under the influence of alcohol; . . .; or

(4) While having .04 percent by weight or more alcohol in the blood.

14 C.F.R. § 91.17(a). Thus, the text of § 91.17 seems to contemplate the operation of state laws making the piloting of an airplane while intoxicated illegal. Such an explicit statement of contemplation, at a minimum, makes it more difficult to make the inference that there is no room left for the states to supplement this field, an inference required for field preemption. See **[*1268]** R.J. Reynolds Tobacco Co., 479 U.S. at 149, 107 S. Ct. at 511.

Appellees contend that § 91.17(c) was promulgated to allow state law enforcement agencies to assist federal aviation officials in conducting breathalyser tests, relying upon § 91.17(e). Although § 91.17(e) **[**24]** does authorize the FAA to use tests administered by state authorities pursuant to § 91.17(c), we doubt that paragraph (e) can plausibly be read to limit paragraph (c) as appellees urge. The plain language of paragraph (c) contemplates such tests by state law enforcement officers "to investigate a suspected violation of State or local

law governing the same or substantially similar conduct prohibited by paragraph (a)(1), (a)(2), or (a)(4)." We conclude that § 91.17(c) severely undercuts appellees' argument that the challenged Florida criminal statutes are preempted.

Further undercutting any argument that the pervasiveness of the FAA regulations suggests field preemption that would encompass the instant Florida statutes is the existence of § I(E) of Appendix J to Part 121 of Title 14 of the regulations. [13] Appendix J, governs alcohol misuse prevention programs, and its relevant provision uses the well established language of conflict preemption. Thus, Appendix J arguably contemplates that only state regulation concerning alcohol misuse that conflicts with the specific guidelines of Appendix J would be

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[13] The text of § I(E) of Appendix J, entitled "Preemption of State and local laws," provides that,

1. Except as provided in subparagraph 2 of this paragraph, these regulations preempt any State or local law, rule, regulation, or order to the extent that:

(a) Compliance with both the State or local requirement and this appendix is not possible; or

(b) Compliance with the State or local requirement is an obstacle to the accomplishment and execution of any requirement in this appendix.

2. The alcohol misuse requirements of this title shall not be construed to preempt provisions of State criminal law that impose sanctions for reckless conduct leading to actual loss of life, injury, or damage to property, whether the provisions apply specifically to transportation employees or employers or to the general public.

14 C.F.R. pt. 121, App. J, § I(E).

preempted. This limited preemption statement suggests that the FAA contemplated **[**25]** that states would also want to regulate alcohol misuse and chose to narrowly preempt only a subset of those possible state regulations. Again, the FAA has apparently left room for state supplementation in the realm of alcohol use and misuse, making it very difficult for us to conclude that appellees' field preemption claim is facially conclusive. **[**26]**

Appellees cite a FAA Legal Opinion Letter to support their claim that we should still infer field preemption in the present case, despite the above analysis. The FAA Legal Opinion Letter, dated October 15, 2002, states in pertinent part that qualifications of persons "operating aircraft are determined by federal rules and not subject to standards varying from state to state." The Supreme Court has noted that while views of an administrative agency on preemption are not dispositive, their own views should be taken into account when determining whether implied preemption exists. See Geier v. Am. Honda Motor Co., 529 U.S. 861, 883-84, 120 S. Ct. 1913, 1926-27, 146 L. Ed. 2d 914 (2000). However, this 2002 Opinion Letter carries little weight in the present case. First, the letter was a response to an inquiry regarding state regulation of flight schools, flight instructors, and other standards for flight training. That sort of interference by the states is very different from the type of statutes in the present case, which have nothing to do with obtaining **[*1269]** pilot licenses or other qualifications a pilot must meet before training to become a pilot. Further, the opinion expressed **[**27]** in that letter is explicitly based on the First Circuit's opinion in

French, 869 F.2d 1, which as explained below is of little precedential value in the present case. Finally, it seems illogical to extend the rationale of an opinion letter to a situation so different from that to which it is addressed, to the exclusion of a regulation promulgated by the same administrative agency that seems to contemplate the precise kind of state regulation at issue in the present case.

Support militating against a finding of facially conclusive field preemption is also found in a recent congressional enactment. In 1994, Congress passed 49 U.S.C. § 45106, which states in part:
(a) Effect on State and local government laws, regulations, standards, or orders.-A State or local government may not prescribe, issue, or continue in effect a law, regulation, standard, or order that is inconsistent with regulations prescribed under this chapter. However, a regulation prescribed under this chapter does not preempt a State criminal law that imposes sanctions for reckless conduct leading to loss of life, injury, or damage to property.

49 U.S.C. § 45106 **[**28]** (a). The first sentence of this statute undercuts the position that the entire field of pilot qualifications and capacity has been preempted, because Congress limited its explicit statement of preemption to state regulation in this field that is inconsistent with the federal regulations. And, the state statutes at issue here are consistent with the federal regulations, and therefore do not fall under the express preemption provision cited in § 45106(a).

We acknowledge appellees' argument that a negative pregnant could be inferred from the statute's second

sentence, inferring that criminal laws regulating reckless conduct are preempted when the conduct does not lead to loss of life, injury, or damage to property. Because of this second sentence of the statute, it may well be more difficult to conclude that § 45106(a) unambiguously provides for only conflict preemption. The circumstance may be one in which the negative pregnants of the two sentences of the statute are simply in tension. Such a circumstance of equipoise, however, would actually support our holding today that field preemption encompassing the Florida statutes challenged here is not facially conclusive. [14] Moreover, **[**29]** there is at least a plausible interpretation of § 45106(a) which favors only conflict preemption. First, the negative pregnant of the first sentence - that Congress intended only conflict preemption - appears in the sentence which contains the explicit preemption provision, whereas the second sentence can plausibly be interpreted as merely elaboration or explanation. Second, the second sentence of the statute can plausibly be interpreted, not as a limitation upon the first sentence, but rather as a mere explanation that Congress did not intend that the Federal Aviation Act or its regulations would be inconsistent with state laws imposing sanctions for

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[14] Compare Ishikawa v. Delta Airlines, Inc., 343 F.3d 1129, reh'g denied and amended by, 350 F.3d 915 (9th Cir. 2003) (holding that because the first sentence of § 45106(a) expressly limited the preemptive effect to "inconsistent" state regulation, it would not infer a negative pregnant from the second sentence of subsection (a) that laws other than the specific state criminal laws described would be preempted), with Frank v. Delta Airlines, Inc., 314 F.3d 195, 199 (5th Cir. 2002) (holding that the narrow scope of the savings clause found in the second sentence of subsection (a) implied a broad scope of preemption for subsection (a), because, the court concluded, the second sentence "would hardly have seemed necessary if state law were only narrowly preempted").

reckless conduct leading to loss of life, injury, or **[*1270]** damage to property. [15] Indeed, it would make no sense to read the second sentence as a limitation upon the first sentence, because any state law actually inconsistent with any federal law would be unenforceable under the Supremacy Clause; thus, it is doubtful that the second sentence of § 45106(a) means that state criminal laws imposing sanctions for reckless conduct leading to loss of life, injury, or damage to property can operate free of any preemption, even if such state laws **[**30]** are inconsistent with federal law. For these reasons, we conclude that § 45106(a) provides additional support for our holding today that there is no facially conclusive preemption of an entire field that would encompass the Florida criminal statutes challenged here.

[31]**

Appellees rely upon French, 869 F.2d 1, and Abdullah, 181 F.3d 363. In French, the airline had fired a pilot for refusing to take a urine test which the airline ordered upon being tipped off by local police of off duty use of marijuana by the pilot. The pilot sued, relying upon a Rhode Island statute requiring such a test to be based upon reasonable grounds to believe drug use is impairing the ability to perform his job. The First Circuit held that the Federal Aviation Act and the regulations promulgated thereunder occupied the field of pilot qualification, thus preempting the state statute. Although there is broad language in the opinion of

[15] This interpretation might suggest a limitation on the FAA's authority to promulgate regulations providing for any preemption broader than conflict preemption, an issue we need not address in this case.

the First Circuit, the holding of the case is not inconsistent with our opinion. Preemption of a state law regulating who is qualified to remain employed as a pilot, or the grounds for discharging a pilot, is very different from the state regulation here which says nothing about who may remain employed by an airline, but rather imposes criminal responsibility for actions of a pilot which are also inconsistent with federal regulations. There is a great need for uniformity in the former circumstance. In contrast, **[**32]** it is not at all clear that the state action at issue here encroaches upon any need for uniformity. Moreover, the French opinion is distinguished in that it was issued on February 23, 1989, before the enactment of 14 C.F.R. § 91.17, which was promulgated on August 18, 1989, with an effective date August 18, 1990, see 54 Fed. Reg. 34284, 34293 (Aug. 18, 1989), and also before the 1994 enactment of 49 U.S.C. § 45106(a). As discussed above, the subsequently enacted statute and regulation both undercut any argument that Congress and the FAA intended to preempt the field so as to prohibit states from enacting criminal statutes such as those in the present case and enforcing them against commercial airline pilots. French relied upon the FAA regulations in the general area of pilots and air safety, 869 F.2d at 4, and upon an intricate web of statutory provisions, id. at 3-4, as supporting the conclusion that the field had been preempted. However, the First Circuit pointed to no regulations or statutes suggesting an absence of preemption. By contrast in this case, 49 U.S.C. § 45106 **[**33]** (a), as well as § 91.17(c) and Appendix J to Part 121 of the regulations suggest a lack of preemption. For these reasons, we conclude that the French opinion has little persuasive value in this case which involves a different preemption

issue, and a facially conclusive standard as to preemption.

Appellees also rely upon Abdullah, 181 F.3d 363. That case involved injuries to passengers sustained during an American Airlines flight when turbulent weather conditions were encountered. The issue was whether federal law preempted the state standard of care for air safety. The **[*1271]** Third Circuit held that the standard of care was federal, preempting the state standard, but that state damage remedies were not preempted. Although Abdullah states broadly that "the entire field of aviation safety is federally preempted," id. at 375, for several reasons we do not believe that Abdullah indicates that it is facially conclusive that the state criminal responsibility that would be imposed in the instant case is preempted. First, although the Abdullah opinion was issued after the enactment of 49 U.S.C. § 45106(a), it did not cite **[**34]** or discuss its significance. We have noted above that this statute arguably undermines the position that the entire relevant field has been preempted, thus supporting our conclusion that preemption in the instant case is not facially conclusive. Second, with respect to the issue in the instant case, there are concrete indications in the federal regulations which suggest that a state's enforcement of its laws relating to alcohol misuse may not be preempted if they are not inconsistent with the federal regulations. See 14 C.F.R. § 91.17; 14 C.F.R. pt. 121, App. J, § I(E). Third, Abdullah held that state remedies were not preempted even though the entire field of aviation safety was preempted. Relying on Silkwood v. Kerr-McGee Corp., 464 U.S. 238, 104 S. Ct. 615, 78 L. Ed. 2d 443 (1984), the court acknowledged that state law damage remedies were inherently regulatory, but

held that Congress had decided to tolerate that tension. 181 F.3d at 375-76. It is not absolutely clear to us, i.e., facially conclusive, that Florida's law with respect to criminal responsibility does not bear some similarity to the state damage remedy **[**35]** which was permitted in Abdullah, and as noted, there are concrete indications in the federal regulations suggesting toleration of such tension in the instant context. Finally, even if Abdullah were inconsistent with an absence of preemption in the circumstances here, Abdullah itself acknowledges considerable contrary authority. See 181 F.3d 372-75. We cannot conclude that the legal landscape and circumstances here render preemption facially conclusive.

In sum, while Congress and the FAA have enacted many statutes and regulations, respectively, governing pilot qualifications and safety, field preemption is based on the inference that the entire field has been occupied, leaving no room for state supplementation. [16] As the discussion above explains, there are indications in congressional statutes and in the FAA's regulations that it was contemplated that state statutes would operate affecting the precise conduct at issue in this case. Therefore, we cannot say it is facially conclusive that appellees are entitled to the inference that there was no room left for state supplementation of the relevant field in the instant case. With respect to appellees' field **[**36]** preemption claim, the district court should have abstained from hearing appellees' claims at this time.

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[16] Field preemption, if applicable, does not depend on whether state supplementation is consistent or inconsistent - field preemption prohibits state supplementation in any form. See Cliff, 363 F.3d at 1122.

C. Express Preemption

The district court also concluded that express preemption of the relevant Florida criminal statutes was readily apparent. This conclusion, if upheld, would, by itself, provide sufficient basis for the district court to hear appellees' claims despite our conclusion concerning field preemption. The district court first determined that Congress had granted authority for the FAA to regulate in the area of pilot qualification and safety in interstate commerce. The district court then determined that the FAA had used this authority intending to preempt the **[*1272]** state laws at issue in the present case. There are, however, several problems with the district court's analysis. **[**37]**

We will first address the district court's conclusion that it is readily apparent that the FAA intended to expressly preempt the Florida statutes at issue. Appellees rely on 14 C.F.R. pt. 121, App. I, which provides in pertinent part as follows:

This appendix contains the standards and components that must be included in an antidrug program required by this chapter.

I. General

A. Purpose. The purpose of this appendix is to establish a program designed to help prevent accidents and injuries resulting from the use of prohibited drugs by employees who perform safety-sensitive functions.

. . . .

XI. Preemption. A. The issuance of 14 CFR parts 65, 121, and 135 by the FAA preempts any state or local law, rule, regulation, order, or standard covering the subject matter of 14 CFR parts 65, 121, and 135, including but not limited to, drug testing of aviation personnel performing safety-sensitive functions.

B. The issuance of 14 CFR parts 65, 121, and 135 does not preempt provisions of state criminal law that impose sanctions for reckless conduct of an individual that leads to actual loss of life, injury, or damage to property whether such provisions apply specifically to aviation **[**38]** employees or generally to the public.

Appellees claim that the express statement of preemption in § XI(A) of Appendix I to Part 121 preempts the state criminal statutes at issue. [17] Appellees' argument, with which the district court agreed, is that 14 C.F.R. § 121.458 [18] makes alcohol

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[17] We acknowledge that the savings clause in § XI(B) does not apply in the present case because there are no facts present in the instant case indicating a loss of life, injury, or damage to property.

[18] 14 C.F.R. § 121.458, entitled "Misuse of alcohol," provides as follows:

(a) General. This section applies to employees who perform a function listed in appendix J to this part for a certificate holder (covered employees). For the purpose of this section, a person who meets the definition of covered employee in appendix J is considered to be performing the function for the certificate holder.

(b) Alcohol concentration. No covered employee shall report for duty or remain on duty requiring the performance of safety-sensitive functions while having an alcohol concentration of 0.04 or greater. No certificate holder having actual knowledge that an employee has an alcohol

abuse a [*1273] "subject matter" that comes under the rubric of § XI(A) of Appendix I to Part 121, and thus, that any state law endeavoring to regulate alcohol use, or, more specifically, misuse, such as the Florida statutes challenged here, should be preempted when they do not criminally sanction

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concentration of 0.04 or greater shall permit the employee to perform or continue to perform safety-sensitive functions.

(c) On-duty use. No covered employee shall use alcohol while performing safety-sensitive functions. No certificate holder having actual knowledge that a covered employee is using alcohol while performing safety-sensitive functions shall permit the employee to perform or continue to perform safety-sensitive functions.

(d) Pre-duty use. (1) No covered employee shall perform flight crewmember or flight attendant duties within 8 hours after using alcohol. No certificate holder having actual knowledge that such an employee has used alcohol within 8 hours shall permit the employee to perform or continue to perform the specified duties.

(2) No covered employee shall perform safety-sensitive duties other than those specified in paragraph (d)(1) of this section within 4 hours after using alcohol. No certificate holder having actual knowledge that such an employee has used alcohol within 4 hours shall permit the employee to perform or continue to perform safety-sensitive functions.

(e) Use following an accident. No covered employee who has actual knowledge of an accident involving an aircraft for which he or she performed a safety-sensitive function at or near the time of the accident shall use alcohol for 8 hours following the accident, unless he or she has been given a post-accident test under appendix J of this part, or the employer has determined that the employee's performance could not have contributed to the accident.

(f) Refusal to submit to a required alcohol test. No covered employee shall refuse to submit to a post-accident, random, reasonable suspicion, or follow-up alcohol test required under appendix J to this part. No certificate holder shall permit an employee who refuses to submit to such a test to perform or continue to perform safety-sensitive functions.

reckless behavior resulting in loss of life, injury, or damage to property.

[39]**

For several reasons, we conclude that Appendix I to Part 121, does not constitute a facially conclusive preemption of the Florida criminal statutes challenged here. First, it is not absolutely clear that the challenged Florida statutes cover the same "subject matter of 14 C.F.R. Parts 65, 121, and 135." Those Parts deal with certification and operating requirements of various designated airline employees. The only example of such "subject matter" given in the preemption language relied upon by appellees specifies drug testing, which is clearly a requirement imposed upon airline employees. It is at least arguable, however, that the criminal responsibility imposed by the Florida statutes is very different; to the extent that the Florida statutes do involve a regulation of conduct, it is a more indirect regulation than most of the requirements in the federal regulations (for example in Part 121, including drug testing). This ambiguity with respect to the "subject matter" scope of the preemptive language of § XI of Appendix I adds some support for the view that the preemption in this case is not facially conclusive.

Second, and even more significant, the FAA has promulgated several **[**40]** other regulations which are in substantial tension with appellees' interpretation of § XI of Appendix I. [19] We have

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[19] See also Ishikawa v. Delta Airlines, Inc., 343 F.3d 1129, 1133, reh'g denied and amended by, 350 F.3d 915 (9th Cir. 2003), where the Ninth Circuit noted the broad language of preemption in Appendix I, but read

already mentioned two such regulations, to which we now turn again:

(a) As noted above, 14 C.F.R. § 91.17(c) contemplates that state law enforcement officers will investigate suspected violations of state and local laws sanctioning airline crew members acting under the influence of alcohol or while having .04 percent by weight or more of alcohol in the blood. There is an obvious tension between this regulation and appellees' position that Appendix I to Part 121 constitutes an absolute preemption **[**41]** of such state and local laws, even ones which are consistent with the federal regulations. This tension provides strong support for our conclusion that it is not facially conclusive that § XI of Appendix I preempts the Florida statutes challenged here.

(b) Appendix J to Part 121 is also in tension with appellees' interpretation of § XI of Appendix I. Appendix J, labeled "Alcohol Misuse Prevention Program," focuses specifically on the standards for the federally authorized alcohol misuse program. It provides in pertinent part:

I. General.

A. Purpose. The purpose of this appendix is to establish programs designed to help prevent accidents and injuries resulting from the misuse of alcohol by **[*1274]** employees who perform safety-sensitive functions in aviation.

Appendix I narrowly because of other regulations which suggested that the common law negligence claim at issue there would not be preempted.

. . .

E. Preemption of State and local laws.

1. Except as provided in subparagraph 2 of this paragraph, these regulations preempt any State or local law, rule, regulation, or order to the extent that:

(a) Compliance with both the State or local requirement and this appendix is not possible; or

(b) Compliance with the State or local requirement is an obstacle to the accomplishment and execution of any requirement in **[**42]** this appendix.

2. The alcohol misuse requirements of this title shall not be construed to preempt provisions of State criminal law that impose sanctions for reckless conduct leading to actual loss of life, injury, or damage to property, whether the provisions apply specifically to transportation employees or employers or to the general public.

14 C.F.R. pt. 121, App. J.

Appendix J to Part 121 sets out a much narrower range of preemption than the preemption provision in Appendix I to Part 121. Appendix J uses the well-established language of conflict preemption, and thus preempts only state or local laws that are inconsistent with federal regulations. This more limited preemption is in tension with the broad preemption which appellees would have us attribute to § XI of Appendix I. In this case, we need only decide that there is no facially conclusive

preemption. Therefore, we need not definitively resolve the tension between Appendix I and Appendix J. However, we do note that Appendix J, employing only the conflict preemption standard, applies specifically to alcohol misuse prevention programs, whereas Appendix I applies to drug testing programs. [20]

[43]**

For these reasons, we cannot conclude that § XI of Appendix I to Part 121 constitutes a facially conclusive express preemption which encompasses the Florida criminal statutes challenged in this case. [21] In light of this conclusion, it is not necessary for us to address whether or not, if the FAA had intended such preemption, such action would have been within the scope of authority granted by Congress. See 49 U.S.C. § 45106(a) (providing for

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[20] We also note that 14 C.F.R. § 121.458, the regulation relied upon by appellees in their argument for express preemption under Appendix I, makes repeated reference to Appendix J in its text. Nowhere does it refer to Appendix I.

[21] n21 The Ninth and the Fifth Circuits also addressed the preemptive effect of § XI(A) of Appendix I to Part 121 of the regulations in Ishikawa, 343 F.3d at 1133, and Frank, 314 F.3d at 198-202, respectively. The Ninth Circuit rejected the invitation to read the preemptive language of Appendix I broadly, relying in part upon the conflicting indications in 49 U.S.C. § 45106(a) and other provisions of the federal regulations. 343 F.3d at 1133. In contrast, the Fifth Circuit in Frank read the preemptive language broadly in both 49 U.S.C. § 45106(a) and in Appendix I. 314 F.3d at 198-202. Although the two cases both involve drug testing, and thus involve a somewhat different preemption issue than in this case, their conflicting interpretations of § 45106(a) and Appendix I provides further support for our holding that those provisions do not constitute a "facially conclusive" preemption of Florida's laws imposing criminal responsibility for appellees' alcohol abuse in this case.

conflict preemption); 49 U.S.C. § 44701(a) (authorizing the FAA to promote safe flight in air commerce by prescribing minimum standards).

[44]**

V. CONCLUSION

For the foregoing reasons, we conclude that neither appellees' express preemption claim nor their field preemption claim is **[*1275]** facially conclusive. Accordingly, the district court should have abstained from deciding appellees' pre-trial habeas petition. The order of the district court granting habeas relief to appellees is reversed, and this case is remanded to the district court with instructions to abstain.

REVERSED and REMANDED.

*274 F. Supp. 2d 1334, *; 2003 U.S. Dist. LEXIS 13585, **;*
16 Fla. L. Weekly Fed. D 580

CHRISTOPHER SCOTT HUGHES and THOMAS PORTER CLOYD, Petitioners, v. THE ELEVENTH JUDICIAL CIRCUIT OF FLORIDA, THE HONORABLE JOSEPH P. FARINA, in his capacity as Chief Judge of The Eleventh Judicial Circuit of Florida, THE HONORABLE DAVID H. YOUNG, in his capacity as a Judge on The Eleventh Judicial Circuit of Florida, and CHARLIE CRIST, Attorney General of the State of Florida, Respondents.

CASE NO. 03-21300-CIV-SEITZ

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA

274 F. Supp. 2d 1334; 2003 U.S. Dist. LEXIS 13585; 16 Fla. L. Weekly Fed. D 580

August 5, 2003, Decided
August 5, 2003, Filed

SUBSEQUENT HISTORY: Reversed by, Remanded by Hughes v. AG of Fla., 2004 U.S. App. LEXIS 15059 (11th Cir. Fla., July 21, 2004)

DISPOSITION: **[**1]** Petitioners' Petition for Writ of Habeas Corpus Under 28 U.S.C. § 2254 granted.

COUNSEL: For Hughes, Petitioner: Jeffrey L. Freeman, Esq., North Miami, FL.

For Hughes, Petitioner: James K. Rubin, Esq., North Miami Beach, FL.

For Cloyd, Petitioner: William M. Pearson, Esq., H. Eugene Lindsey, Esq., Beatrice Butchko, Esq., Ferrell Schultz Carter Zumpano & Fertel, PA, Miami, FL.

For Respondents: Richard L. Polin, Esq., Office of the Attorney General, Miami, FL.

For Respondents: Katherine Fernandez Rundle, Miami-Dade State Attorney, Miami, FL.

JUDGES: PATRICIA A. SEITZ, UNITED STATES DISTRICT JUDGE.

OPINIONBY: PATRICIA A. SEITZ

OPINION: [*1335] ORDER GRANTING CHRISTOPHER SCOTT HUGHES AND THOMAS PORTER CLOYD'S PETITION FOR WRIT OF HABEAS CORPUS PURSUANT TO 28 U.S.C. § 2254

THIS MATTER is before the Court on the Petition for Writ of Habeas Corpus of Petitioners Christopher Scott Hughes ("Hughes") and Thomas Porter Cloyd ("Cloyd") pursuant to 28 U.S.C. § 2254. Hughes and Cloyd, both former pilots for America West Airlines, seek to enjoin the **[*1336]** State of Florida from criminally **[**2]** prosecuting them for operating a commercial aircraft while under the influence of alcohol. Hughes and Cloyd contend that

federal law exclusively governs their actions as federally certified commercial airline pilots and preempts the state criminal laws under which the State seeks to prosecute them. The Attorney General of Florida, on behalf of the Respondents, maintains that the State has concurrent power to prosecute federally certified commercial airline pilots for operating an aircraft while under the influence of alcohol.

As the state trial has not yet begun, the first issue is whether the Court may properly intervene at this early stage of the state criminal proceedings, or whether abstention is required. Second, if abstention is not required, the Court must determine whether Hughes and Cloyd have met the statutory requirements for pretrial habeas relief by demonstrating that the State Courts' denial of their motion to dismiss the state charges on federal preemption grounds was contrary to, or involved an unreasonable application of clearly established federal law. In order to address both of these issues, the Court must determine whether federal law governing pilot qualifications **[**3]** and capacity to operate commercial aircraft in interstate commerce preempts the state criminal laws under which the State seeks to prosecute Hughes and Cloyd. Consideration of these issues requires recognition of the federal government's interests in maintaining and enforcing uniform, nationwide standards regulating the behavior of commercial airline pilots, and the State's interests in enforcing its criminal laws to protect the safety and welfare of its citizens.

Having considered Hughes and Cloyd's Petition for Writ of Habeas Corpus, Respondents' Response, the Reply thereto, Respondents' Supplemental Response

and Supplemental Authorities, and having heard oral argument on this matter, the Court holds that federal law governing pilot qualifications and capacity to operate commercial aircraft in interstate commerce preempts the state criminal laws under which the State seeks to prosecute Hughes and Cloyd through both field and express preemption. Because preemption is readily apparent, the Court must not abstain from intervening in the state criminal proceedings. Additionally, Hughes and Cloyd have demonstrated that the State Courts unreasonably applied clearly established federal **[**4]** law to the facts in this case. Thus, the Court must grant the petition, order the State Courts to discharge Hughes and Cloyd from the State's custody, quash the state criminal proceedings, and enjoin the State from taking any further criminal action against Hughes and Cloyd for the actions described in State of Florida v. Christopher Scott Hughes and Thomas Porter Cloyd,.

I. FACTUAL AND PROCEDURAL BACKGROUND

On July 1, 2002, First Officer Hughes and Captain Cloyd, both federally certified airmen at the time, boarded America West Airlines Flight 566 in preparation for a commercial flight from Miami, Florida to Phoenix, Arizona. Shortly after Flight 566 pushed back from the gate at Miami International Airport with Hughes and Cloyd at the controls, officers from the Miami-Dade County Police Department contacted the Transportation Security Administration and asked for permission to recall Flight 566 based upon tips from officials at the security checkpoint that the pilots smelled of alcohol. After the Transportation Security

Administration granted permission and air traffic control recalled the plane to the gate, Miami-Dade police officers interviewed the **[**5]** pilots.

Approximately two hours later, Miami-Dade police took Hughes and Cloyd to the station and administered breathalyzer **[*1337]** tests. The results of those tests revealed that both Hughes and Cloyd had breath-alcohol levels exceeding the 0.08 limit under Florida criminal law, exceeding the 0.04 federal regulatory limit, but not exceeding the federal criminal limit of 0.10. As a result of the breathalyzer tests, America West permanently fired Hughes and Cloyd, and the Federal Aviation Administration ("FAA") permanently revoked their airmen and medical certificates.

Thereafter, on July 22, 2002, the State filed a two-count Information criminally charging Hughes and Cloyd with operating an aircraft while under the influence of alcohol in violation of Fla. Stat. §§ 316.193(1)(c) [1] and 860.13(1)(a). [2] Hughes and Cloyd pleaded "not guilty" to all state charges. The

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[1] Fla. Stat. § 316.193(1)(c) provides:
(1) A person is guilty of the offense of driving under the influence and is subject to punishment as provided in subsection
(2) if the person is driving or in actual physical control of a vehicle within this state and: . . . (c) The person has a breath-alcohol level of 0.08 or more grams of alcohol per 210 liters of breath.
Fla. Stat. § 316.193(1)(c). **[**6]**

[2] Fla. Stat. § 860.13(1)(a) provides:
(1) It shall be unlawful for any person:
(a) To operate an aircraft in the air or on the ground or water while under the influence of:
1. Alcoholic beverages. . . .
Fla. Stat. § 860.13(1)(a).

State Circuit Court Judge released both Hughes and Cloyd on bail pending trial which is presently set for October, 2003.

On September 4, 2002, Hughes and Cloyd moved to dismiss the state criminal charges, arguing that the State Circuit Court lacks subject matter jurisdiction over the acts alleged in the Information because federal law preempts state law in the area of pilot qualification and capacity to operate commercial aircraft in interstate commerce. [3] On October 23, 2002, the State Circuit Court conducted a hearing on Hughes and Cloyd's motion and denied their request to dismiss the Information without written opinion. [4] Thereafter, Hughes and Cloyd filed a Petition for Writ of Prohibition with the Third District Court of Appeal, challenging the State Circuit Court's ruling. On January 9, 2003, the Third District Court of

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[3] On September 30, 2002, the State filed an Amended Information, adding one count of culpable negligence under Fla. Stat. § 784.05(1), which provides:

(1) Whoever, through culpable negligence, exposes another person to personal injury commits a misdemearior of the second degree, punishable as provided in s. 775.082 or s. 775.083. Fla. Stat. § 784.05(1).

[4] At the conclusion of the October 23, 2002 hearing on Hughes and Cloyd's motion to dismiss, the State Court orally denied the motion as follows:

Listening to the arguments, reading the case and the supplemental authority, which counsel gave me last time, was interesting reading. Thank you, very much. I'm going to respectfully deny the motion to dismiss for lack of jurisdiction. Don't think it is applicable, in this case. The case law is pretty clear, around the country and even in our own federal circuit, giving us the authority in state court, here, in the State of Florida to prosecute these offenses.

Oct. 23, 2002 Tr. at 35.

Appeal held oral argument and denied Hughes and Cloyd's petition without opinion. The Third District Court of Appeal also considered Petitioners' motions **[**7]** for rehearing and written opinion, motion for certification of great public importance, and motion for rehearing en banc, and denied those motions without opinion. [5]

Having exhausted their state remedies, Hughes and Cloyd petitioned for a writ of **[*1338]** habeas corpus pursuant to 28 U.S.C. § 2254, asking this Court to discharge them from the State's custody, quash the state proceedings, and enjoin the State from taking any further action against them. [6] Hughes and Cloyd contend that federal habeas relief is appropriate for two reasons. First, they argue that they have satisfied the threshold requirements of 28 U.S.C. § 2254 because: (a) they are in custody pursuant to a state court judgment; and (b) they have exhausted their available state court remedies. [7]

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[5] As both of the Third District Court of Appeal's decisions were issued without opinion, those Orders stand as the Orders of the highest court in the State. The Florida Star v. B.J.F., 530 So. 2d 286, 288 (Fla. 1988).

[6] As a preliminary matter, Respondents object to Hughes and Cloyd naming the individual State Court judges as Respondents in this matter. Hughes and Cloyd, however, assert that the individual judges are properly named in this matter, as they are the state officials who have direct control and authority over Hughes and Cloyd who are presently out on bail. See Fla. Stat. § 903.02 (providing that only the judge who imposed the conditions of bail or the chief judge of the circuit in which the defendant is to be tried may remove or alter a condition of bail). In light of Fla. Stat. § 903.02, the Court finds that the state trial judge and the chief judge of the circuit are properly named parties, as they have control over altering the conditions of bail imposed on Hughes and Cloyd.

[7] The parties do not dispute that Hughes and Cloyd have met the threshold jurisdictional requirements for pursuing habeas relief under 28

Second, Hughes and Cloyd also maintain that federal law preempts state law in the area of pilot qualification and capacity to operate commercial aircraft in interstate commerce, and therefore, the State lacks jurisdiction to prosecute **[**9]** them.

[10]**

Hughes and Cloyd premise their federal preemption arguments primarily on field preemption. Specifically, they argue that Congress has impliedly preempted the field of law governing the qualifications and capacity of pilots operating commercial aircraft in interstate commerce through the comprehensive scheme of federal regulations under 49 U.S.C. § 44701 *et seq.*, [8] and the federal

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U.S.C. § 2254. First, because Hughes and Cloyd have been released on bail pretrial with travel restrictions, they are "in custody" for purposes of 28 U.S.C. § 2254. See Hensley v. Municipal Court, San Jose Milpitas Judicial District, Santa Clara County, Cal., 411 U.S. 345, 347-49, 36 L. Ed. 2d 294, 93 S. Ct. 1571 (1973) (holding that a defendant released on bail or his own recognizance is "in custody" for purposes of 28 U.S.C. § 2254). Second, Hughes and Cloyd have exhausted their state court remedies, as both the state Circuit Court and the Third District Court of Appeals have considered and denied their request to dismiss the Information on federal preemption grounds. Accordingly, the Court has jurisdiction to consider Hughes and Cloyd's petition under 28 U.S.C. § 2254. Additionally, 28 U.S.C. § 2241(c) provides that "the writ of habeas corpus shall not extend to a prisoner unless--. . . (3) He is in custody in violation of the Constitution or laws or treaties of the United States. . . ." 28 U.S.C. § 2241(c)(3). For the reasons stated herein, the Court concludes that habeas relief is appropriate, as Petitioners are in custody in violation of the Supremacy Clause in Article VI, clause 2 of the United States Constitution.

[8] 49 U.S.C. § 44701(a) provides in relevant part:

(a) Promoting safety. -- The Administrator of the Federal Aviation Administration shall promote safe flight of civil aircraft in air commerce by prescribing -- . . .

criminal prohibitions against piloting a commercial aircraft while intoxicated pursuant to 18 U.S.C. §§ 341-343. [9] In the alternative, Hughes **[*1339]** and Cloyd maintain that Congress has expressly preempted the same area of law under 14 C.F.R. Pt. 121, App. I, § XI. [10]

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(5) regulations and minimum standards for other practices, methods, and procedure the Administrator finds necessary for safety in air commerce and national security.

49 U.S.C. § 44701(a). **[**11]**

[9] 18 U.S.C. §§ 341-343 provide:

§ 341. Definitions

As used in this chapter, the term "common carrier" means a locomotive, a rail carrier, a sleeping car carrier, a bus transporting passengers in interstate commerce, a water common carrier, and an air common carrier.

§ 342. Operation of a common carrier under the influence of alcohol or drugs

Whoever operates or directs the operation of a common carrier while under the influence of alcohol. . .shall be imprisoned not more than fifteen years or fined under this title, or both.

§ 343. Presumptions

For purposes of this chapter -- (1) an individual with a blood alcohol content of.10 percent or more shall be presumed to be under the influence of alcohol. . . .

18 U.S.C. §§ 341-343.

[10] Hughes and Cloyd also argue that Congress has expressly preempted the field of law governing the qualifications and capacity of commercial pilots under 49 U.S.C. § 41713(b)(1), which provides:

Except as provided in this subsection, a State, political subdivision of a State, or political authority of at least 2 States may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of an air carrier that may provide air transportation under this subpart.

49 U.S.C. § 41713(b)(1). The Court finds this argument to be without merit because a "law related to a. . .service" clearly does not govern the qualifications and capacity of interstate commercial airline pilots in the performance of their duties.

[**12]

In response, Respondents make two main arguments. First, that pursuant to Younger v. Harris, 401 U.S. 37, 27 L. Ed. 2d 669, 91 S. Ct. 746 (1971), the Court should abstain from interfering with the State Court criminal proceedings until those proceedings have been completed, i.e., until Hughes and Cloyd have been tried and found guilty. Second, that Petitioners have not demonstrated that the State Courts' refusal to dismiss the state prosecution on grounds of federal preemption were either contrary to or involved an unreasonable application of clearly established federal law as determined by the Supreme Court. See 28 U.S.C. § 2254(d). [11]

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II. ABSTENTION

Federal courts must not interfere with pending state criminal proceedings in the absence of extraordinary circumstances demonstrating a great and immediate threat of irreparable injury. Younger, 401 U.S. at 46; Kolski v. Watkins, 544 F.2d 762, 764-65 (5th Cir.

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[11] 28 U.S.C. § 2254(d) provides in relevant part: An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—
(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States. . . .
28 U.S.C. § 2254(d).

1977). [12] This longstanding policy is grounded in two legal principles. The first "is the basic doctrine of equity jurisprudence that courts of equity should not act, and particularly should not act to restrain a criminal prosecution, when the moving party has an adequate remedy at law and will not suffer irreparable injury if denied equitable relief." Younger, 401 U.S. at 43-44. The second is "the notion of 'comity,' that is, a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways." Id. at 44.

[14]**

While Younger did not specify the types of "extraordinary circumstances" warranting federal intervention, it did suggest that extraordinary circumstances may arise **[*1340]** where a state statute is found to be "flagrantly and patently violative of express constitutional prohibitions in every clause, sentence and paragraph, and in whatever manner and against whomever an effort might be made to apply it." Id. at 53. Applying Younger, the Eleventh Circuit has held that federal court intervention is required where a petitioner demonstrates that federal preemption of state law is "readily apparent." Baggett v. Dep't of Prof'l Regulation, 717 F.2d 521, 524 (11th Cir. 1983).

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[12] In Bonner v. City of Prichard, 661 F.2d 1206 (11th Cir. 1981), the Eleventh Circuit adopted as binding precedent all decisions of the Fifth Circuit rendered on or before September 30, 1981.

In Baggett, the plaintiff was a marine pilot, holding both federal and state licenses, who allegedly piloted a tug and barge into Tampa Bay Harbor while intoxicated. Notwithstanding the fact that the tug and barge were considered "enrolled vessels," and thereby subject to the exclusive control of the United States, Florida's Department of Professional Regulation, through its Board of Pilot Commissioners, filed an administrative complaint against the plaintiff for piloting the vessels while intoxicated. **[**15]** The plaintiff, however, argued that federal law preempted state law because his actions as a tug and barge pilot were governed by federal statutes and regulations, and therefore the state agency could not pursue an administrative complaint against him.

The Eleventh Circuit, agreeing with the plaintiff, held that where federal preemption is readily apparent, abstention is not appropriate. [13] Baggett, 717 F.2d at 524. While observing that "Florida has an important interest in insuring that state licensed marine pilots do not navigate registered vessels in a dangerous manner," the Eleventh Circuit emphasized that "Congress, however, has determined that the United States has an identical interest in insuring safe pilotage of enrolled vessels, and that the states should not interfere with federal enforcement of its requirements of pilots operating under federal licenses." Id. at 523-24. The Eleventh

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[13] Specifically, in finding federal preemption, the Eleventh Circuit relied on the terms of 46 U.S.C. § 364, which provides in relevant part that: "All coastwise seagoing vessels, and vessels navigating the Great Lakes, shall be subject to the navigation laws of the United States, when navigating within the jurisdiction thereof. . . ." 46 U.S.C. § 364 (repealed 1983).

Circuit concluded that "a pilot operating under his federal license ought not to be subject to state disciplinary proceedings when his conduct conforms to federal regulations." Id. at 523.

In light of Baggett, and because it is readily apparent that federal law exclusively governs the qualifications and capacity of pilots to operate commercial aircraft in interstate commerce, abstention is not proper in this case. See infra sec. IV. To abstain from addressing the merits of Hughes and Cloyd's petition would be to subject them to trial on charges for which the State lacks jurisdiction. Baggett, 717 F.2d at 524 ("When preemption is readily apparent...the state tribunal is acting beyond the lawful limits of its authority....").

III. GENERAL HABEAS REQUIREMENTS

To prevail on a federal habeas petition filed pursuant to 28 U.S.C. § 2254(d)(1), a petitioner must demonstrate that "the relevant state-court decision was either (1) *contrary to*. . .clearly established Federal law, as determined by the Supreme Court of the United States or (2) *involved an unreasonable application of*. . .clearly established Federal law, as determined by the Supreme Court of the United States." Williams v. Taylor, 529 U.S. 362, 404-05, 146 L. Ed. 2d 389, 120 S. Ct. 1495 (2000) (internal quotations omitted). [14] Although **[**17]** the State

[14] A state court decision will be *contrary to* clearly established Supreme Court precedent if: (1) the state court applies a rule that contradicts the governing law set forth by the Supreme Court; or (2) the state court confronts a set of facts that are materially indistinguishable from a decision of the Supreme Court and nevertheless arrives at a result different from Supreme Court precedent. Williams, 529 U.S. at 405-06. Alternatively, a state court decision involves *an unreasonable*

Courts did **[*1341]** not explain the basis for their decisions rejecting Hughes and Cloyd's federal preemption arguments, such fact does not prevent application of the Williams test. All that is required for purposes of a federal habeas petition "is a rejection of the claim on the merits [by the state court], not an explanation." Wright v. Secretary for the Dep't of Corrections, 278 F.3d 1245, 1255 (11th Cir. 2002) ("To conclude otherwise on this issue would be writing into § 2254(d)(1) an additional requirement that Congress did not put there-a requirement that the state courts explain the rationale of their decisions."). [15]

Thus, the Court assumes that the State Courts applied the correct Supreme Court precedent on federal preemption, and proceeds not under the "contrary to" test which is used only where the state court applies the incorrect law, but under the "unreasonable application of" test as the Eleventh Circuit did in Wright. As discussed infra sec. IV, the Court concludes that the State Courts unreasonably applied the well-established federal preemption doctrine to the facts in this case.

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application of clearly established Supreme Court precedent if: (1) the state court identifies the correct governing legal rule from the Supreme Court's cases, but unreasonably applies the rule to the facts of the petitioner's case; or (2) the state court unreasonably extends a legal principle from Supreme Court precedent to a new context where it should not apply or unreasonably refuses to extend that principle to a new context where it should apply. Id. at 407. **[**18]**

[15] For example, in Wright, where the state court did not issue an opinion explaining the basis for its decision rejecting the petitioner's procedural due process claim, the Eleventh Circuit proceeded to analyze the petitioner's habeas petition under the "unreasonable application of" prong. Wright, 278 F.3d at 1256.

IV. FEDERAL PREEMPTION

A. *General Principles of Federal Preemption*

The Supremacy Clause of the United States Constitution provides the foundation for the federal preemption doctrine:

This Constitution, and the Laws of the United States which shall be **[**19]** made in Pursuance thereof . . .shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. Const., art. VI, cl. 2. The Supreme Court has held that the Supremacy Clause requires federal preemption in three circumstances: (1) express preemption, where a federal statute contains explicit preemptive language; (2) field preemption, where the federal regulatory scheme is so pervasive that Congress left no room for the States to supplement it; and (3) conflict preemption, where compliance with both federal and state regulations is a physical impossibility or where state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. Pharmaceutical Research & Mfrs. of Am. v. Meadows, 304 F.3d 1197, 1205 (11th Cir. 2002) (citing Gade v. Nat'l Solid Wastes Mgmt., 505 U.S. 88, 98, 120 L. Ed. 2d 73, 112 S. Ct. 2374 (1992)). "Congressional intent is the ultimate touchstone in a preemption case . . . and this intent governs [a court's] determination of whether federal law preempts state law. **[**20]** " This That and the Other Gift & Tobacco, Inc. v. Cobb County,

[*1342] Ga., 285 F.3d 1319, 1322 (11th Cir. 2002) (citations and internal quotations omitted).

B. *Field Preemption*

Hughes and Cloyd's primary argument is that Congress and the FAA, under its Congressionally-mandated authority to regulate, have preempted the field of law governing the qualifications and capacity of pilots who operate commercial aircraft in interstate commerce. Field preemption exists where either: (1) the pervasiveness of the federal regulation precludes supplementation by the States; (2) the federal interest in the field is sufficiently dominant; or (3) the object the federal law seeks to obtain and the character of obligations federal law imposes reveal the same purpose. Schneidewind v. ANR Pipeline Co., 485 U.S. 293, 299, 99 L. Ed. 2d 316, 108 S. Ct. 1145 (1988) (holding that the federal Natural Gas Act preempts Michigan's state law regulating the issuance of long-term securities because Michigan's regulation "impinges on a field that the federal regulatory scheme has occupied"); Fidelity Fed. Sav. & Loan Ass'n v. Cuesta, 458 U.S. 141, 153-54, 73 L. Ed. 2d 664, 102 S. Ct. 3014 (1982) **[**21]** (noting that administrative regulations have the same preemptive power as statutes where Congress has delegated the requisite authority to the administrative agency).

The ultimate question in any preemption inquiry is whether Congress intended for the federal government to have exclusive control of a particular field of law. Cal. Fed. Sav. & Loan Ass'n v. Guerra, 479 U.S. 272, 280, 93 L. Ed. 2d 613, 107 S. Ct. 683 (1987). It must also be noted that "although the term 'field preemption' suggests a broad scope, the scope

of a field deemed preempted by federal law may be narrowly defined." Abdullah v. Am. Airlines, Inc., 181 F.3d 363, 367 (3d Cir. 1999). The Court's holding here is informed by the facts of the case and is thus narrowly applied only to the field of qualifications and capacity to pilot regularly scheduled commercial flights in interstate commerce where there are no actual fatalities or injuries to persons or property. Looking at the pervasiveness of the federal regulations in this field and the dominant federal interests in promoting uniform standards regulating the behavior of commercial pilots, it is readily apparent that Congress has **[**22]** preempted the field.

(1) Pervasiveness of the Federal Regulations

In 49 U.S.C. § 44701(a), Congress granted the FAA the authority to promote safe flight of civil aircraft in air commerce. Specifically, 49 U.S.C. § 44701(a)(5) requires the FAA to create regulations regarding the "practices, methods, and procedure the Administrator finds necessary for safety in air commerce and national security." Additionally, 49 U.S.C. § 44701(c) requires the Administrator to "carry out this chapter in a way that best tends to reduce or eliminate the possibility or recurrence of accidents in air transportation." Thus, this language indicates Congress' clear intent to empower the FAA to regulate the airline transportation industry to ensure safe flights. A key factor in flight safety is the qualifications and capacity of those at the helm of the flight, namely the pilots.

Pursuant to this grant of authority from Congress, the FAA has promulgated extensive regulations in the area of commercial pilot qualifications, including

pilot licensing (14 C.F.R. § 61.1 *et seq.*), pilot medical requirements **[**23]** (14 C.F.R. § 67.1 *et seq.*), pilot conduct (14 C.F.R. § 91.1 *et seq.*), operating requirements (14 C.F.R. §§ 121.1 *et seq.* & 135.1 *et seq.*), and the misuse of alcohol while on duty (14 C.F.R. §§ 135.253 & 121.458). [16] Additionally, Congress has made it a federal crime for pilots to operate a commercial aircraft with **[*1343]** a blood alcohol concentration of 0.10 or more. 18 U.S.C. §§ 341-343. The FAA has also promulgated regulations imposing criminal penalties for specified violations of the Federal Aviation Act or any related regulations. See 14 C.F.R. § 13.23. [17]

[24]**

This comprehensive web of legislation makes it

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[16] 14 C.F.R. §§ 135.253 and 121.458 both provide in relevant part that: "No covered employee shall report for duty or remain on duty requiring the performance of safety-sensitive functions while having an alcohol concentration of 0.04 or greater."

[17] 14 C.F.R. § 13.23 provides in relevant part: "Sections 902 and 1203 of the Federal Aviation Act of 1958 [now codified as 49 U.S.C. 46316 and 46307], provide criminal penalties for any person who knowingly and willfully violates specified provisions of that Act, or any regulation or order issued under those provisions." For example, the Federal Aviation Act provides criminal penalties for registration violations involving aircraft not providing air transportation (49 U.S.C. § 46306), violation of national defense airspace (49 U.S.C. § 46307), interference with air navigation (49 U.S.C. § 46308), concession and price violations (49 U.S.C. § 46309), reporting and recordkeeping violations (49 U.S.C. § 46310), unlawful disclosure of information (49 U.S.C. § 46311), transporting hazardous material (49 U.S.C. § 46312), refusing to appear or produce records (49 U.S.C. § 46313), entering aircraft or airport area in violation of security requirements (49 U.S.C. § 46314), lighting violations involving transporting controlled substances by aircraft not providing air transportation (49 U.S.C. § 46315), and general criminal penalties when specific penalties are not provided (49 U.S.C. § 46316).

readily apparent that Congress intended to preempt the field of pilot qualifications and capacity to fly a commercial airliner in interstate commerce. See French v. Pan Am Express, Inc., 869 F.2d 1, 6 (1st Cir. 1989) (holding that the Federal Aviation Act preempts Rhode Island's employee drug testing law as applied to commercial pilots, and inferring "from the Federal Aviation Act an unmistakably clear intent to occupy the field of pilot regulation related to air safety, to the exclusion of state law"); see also Abdullah, 181 F.3d at 367 ("The FAA and relevant federal regulations establish complete and thorough safety standards for interstate and international transportation that are not subject to supplementation by, or variation among, jurisdictions.").

(2) Federal Interests and Goals

The Federal Aviation Act embodies Congress' goals and interests in the field of airline transportation. The following statement in the Senate Report on the Act provides a clear expression of Congress' intent to grant to the FAA complete regulatory power over this field:

Aviation is unique among transportation **[**25]** industries in its relation to the federal government--it is the only one whose operations are conducted almost wholly within federal jurisdiction, and are *subject to little or no regulation by States or local authorities*. Thus the federal government bears virtually complete responsibility for the promotion and supervision of this industry in the public interest.

Abdullah, 181 F.3d at 368 (citing S.Rep. No. 1811,

85th Cong., 2d Sess. 5 (1958)) (emphasis added). The House Report reenforces the Senate's view, stating that the "administration of the new Federal Aviation Agency (1) would be given full responsibility and authority for the. . .promulgation and enforcement of safety regulations. . . ." French, 869 F.2d at 5 (citing H.R.Rep. No. 2360, 85th Cong., 2d Sess., 22, *reprinted in* 1958 U.S.C.C.A.N. 3741, 3741).

The FAA, pursuant to its interpretation of its Congressional authority to preempt the states in certain areas, has stated that pursuant to an "analysis of the legislative history of the Federal Aviation Act and recognition of the comprehensive regulatory scheme governing aviation ... courts throughout the country have recognized **[**26]** a **[*1344]** Congressional intent to preclude supplementation by the States." [18] (See Oct. 15, 2002 Letter from FAA Deputy Chief Counsel to Gen. Counsel of Aircraft Owners and Pilots Assoc., [DE-3], Exh. K). Additionally, the Airways Modernization Board Chairman, representing the Executive Branch before the House during its consideration of the Act, declared that "it is essential that one agency of government, and one agency alone, be responsible for issuing safety regulations if we are to have timely and effective guidelines for safety in aviation." Abdullah, 181 F.3d at 369 (citing 1958 U.S.C.C.A.N. at 37613). This dominant federal

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[18] While an administrative agency's own views of preemption are not dispositive on the issue, the Supreme Court has noted, that "the [Federal] agency's own views should make a difference" when determining if implied preemption exists. Geier v. Am. Honda Motor Co., Inc., 529 U.S. 861, 883, 146 L. Ed. 2d 914, 120 S. Ct. 1913 (2000) (placing "some weight" on the Department of Transportation's suggestion that state actions based on automotive safety were preempted by federal law).

interest in uniform, nationwide standards is especially important when dealing with federally certified pilots operating commercial aircraft in interstate commerce. If the states were free to regulate in this area, "a patchwork of state laws. . .some in conflict with each other, would create a crazyquilt effect." French, 869 F.2d at 6.

[27]**

It is important to note that this federal regulatory scheme has explicitly saved certain State actions from preemption. Where there is "actual loss of life, injury, or damage to property," the FAA recognizes the State's interest in protecting its citizens from a pilot's misuse of alcohol. See 14 C.F.R. Pt. 121, App. I, § XI(B). Therefore, State action is appropriate and authorized where a pilot's actions result in actual loss of life, injury, or damage to property. Had the actions of Hughes and Cloyd produced such consequences, there would be nothing to shield them from the full police powers of the State. However, Respondents concede that, fortunately, Hughes and Cloyd did not cause any harm to any person or property. Thus, because of the dominant federal interest in uniformity of pilot qualification regulation, the goals of Congress in creating the FAA, and the pervasive FAA regulatory scheme, it is readily apparent that the federal government has preempted the field of pilot qualifications in regularly scheduled commercial interstate flights where there is no actual loss of life, injury or damage to property. [19]

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[19] Respondents cite a number of opinions in which various state courts have upheld state prosecutions of pilots for a variety of infractions against federal preemption arguments. See State of Minnesota v.

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[*1345] C. *Express Preemption*

In addition to preempting the field, the FAA has expressly preempted certain State laws. Express preemption exists where a federal statute contains explicit preemptive language. Meadows, 304 F.3d at 1205. The Supreme Court has also held that "Federal regulations have no less pre-emptive effect than federal statutes." Cuesta, 458 U.S. at 153-54 ("Where Congress has directed an administrator to

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Sherbrooke, 633 N.W.2d 856 (Minn. Ct. App. 2001.) (upholding state prosecution of pilot who unlawfully landed an airplane on the highway, and holding that "federal law does not preempt states from regulating the operation of an aircraft on a state highway); State of Ohio v. Collins, 18 Ohio App. 3d 72, 18 Ohio B. 237, 480 N.E.2d 1132 (Ohio Ct. App. 1984) (upholding state prosecution of pilot who failed to exhibit his pilot's license upon demand of state police officer, and finding no pervasive federal regulatory scheme in area of pilot licensing); People v. Valenti, 153 Cal. App. 3d Supp. 35, 153 Cal. App. 3d Supp. 35, 200 Cal. Rptr. 862 (Cal. Ct. App. 1984) (upholding state prosecution of pilot for unsafe operation of aircraft, and rejecting federal preemption argument); Marsh v. State of New Mexico, 95 N.M. 224, 620 P.2d 878 (N.M. 1980) (upholding state prosecution of pilot who flew small plane with 479 pounds of marijuana over Valencia County, and holding that Federal Aviation Act does not preempt state prosecution for criminal offenses occurring in airspace over New Mexico); Ward v. State of Maryland, 280 Md. 485, 374 A.2d 1118 (1977) (upholding state prosecution of pilot for operating an aircraft in a reckless manner, and holding that the Federal Aviation Act did not preempt Maryland criminal laws). These non-binding cases in other jurisdictions are distinguishable on a variety of grounds, beginning with the fact that none of them involve pilots operating a regularly scheduled commercial airliner in interstate commerce, but rather all involve private pilots operating private aircraft. Additionally, Ward, which is the most factually similar case, in that it involves the piloting of an aircraft while under the influence of alcohol, was decided prior to Congress' enactment of 18 U.S.C. § 342 in 1986, and the FAA's promulgation of 14 C.F.R. Pt. 121, App. I, § XI in 1994.

exercise his discretion, his judgments are subject to judicial review only to determine whether he has exceeded his statutory authority or acted arbitrarily.") Thus, the first question in an express preemption inquiry involving administrative regulations is whether Congress has granted authority to the FAA to regulate in the area of the qualifications of commercial pilots in interstate commerce. Assuming that question is answered affirmatively, the question becomes whether the FAA has used that power to preempt the state laws at issue here.

As discussed above, Congress has granted the FAA the power to regulate the field of commercial pilot qualifications to promote safety in interstate air commerce and national security. See **[**29]** supra sec. IV, B(1). Pursuant to this grant of power, the FAA has done so. Especially pertinent here is 14 C.F.R. Pt. 121, Appendix I, § XI, which contains explicit language preempting the States in certain areas. [20] 14 C.F.R. Pt. 121, App. I, § XI expressly provides:

A. The issuance of 14 CFR parts 65, 121, and 135 by the FAA preempts any state or local law, rule, regulation, order, or standard covering the subject matter of 14 CFR parts 65, 121, and 135, including but not limited to, drug testing of aviation personnel performing safety-sensitive functions.

B. The issuance of 14 CFR parts 65, 121, and 135 does not preempt provisions of state

[20] It appears that neither the Petitioners nor Respondents brought 14 C.F.R. Pt. 121, App. I, § XI to the State Courts' attention. In fact, it was only in a belated filing of Supplemental Authorities in Support of Response to Petition for Writ of Habeas Corpus, that Counsel for Respondents brought Appendix I to this Court's attention.

> criminal law that impose sanctions for reckless conduct of an individual that leads to *actual loss of life, injury, or damage to property* whether such provisions apply specifically to aviation employees or generally to the public. (emphasis added).

[30]**

The plain language of this regulation expressly preempts all state criminal laws governing incidents that do not involve "actual loss of life, injury, or damage to property," and are covered in 14 C.F.R. parts 65, 121, or 135. See 14 C.F.R. Pt. 121, App. I, § XI. While Part 65 regulates certification of airmen other than flight crewmembers, Parts 121 and 135 regulate flight crewmembers. [21] Specifically, in a section entitled "Misuse of Alcohol," 14 C.F.R. §§ 121.458 and 135.253 prohibit flight crewmembers from using alcohol or having a blood alcohol level above 0.04 while performing safety-sensitive functions, performing their duties within 8 hours after using alcohol, or refusing to submit to alcohol testing. [22]

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[21] Both of these sections apply to all employees listed as "covered employees" in 14 C.F.R. Pt. 121, App. J. This category includes any employee who performs "Flight crewmember duties," such as pilots.

[22] Although the State argues that 14 C.F.R. § 91.17 contradicts the preemptive language of 14 C.F.R. Pt. 121, App. I, § XI, a thorough reading of § 91.17 reveals that it does not. First, § 91.17 contains no language regarding preemption. Second, although § 91.17(c) mandates that crewmembers shall submit to State officers administering alcohol tests, this does not contradict the express preemption in 14 C.F.R. Pt. 121, App. I, § XI because the FAA made an exception for state prosecutions where there is actual loss of life, injury, or damage to property. In fact, § 91.17(e) provides for state officers to administer these

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[*1346] In sum, 14 C.F.R. Pt. 121, App. I, § XI expressly prevents the states from pursuing criminal charges for unlawful alcohol consumption against federally certified commercial pilots operating regularly scheduled commercial flights in interstate commerce. Therefore, it is readily apparent that the federal government's preemptive regulation expressly prevents the State from criminally prosecuting Hughes and Cloyd. [23]

V. CONCLUSION

Based upon the foregoing reasons, the Court holds that federal law preempts state law in the area of pilot qualifications and capacity to operate commercial aircraft in interstate commerce where there is no actual loss of life, injury, or damage to property. There are no allegations that Hughes and Cloyd caused actual injury to any persons or property. Therefore, the State lacks jurisdiction to prosecute them for matters that are solely within the jurisdiction [**32] of the federal government. Because federal preemption is readily apparent, the Court must not abstain in this case. Baggett, 717 F.2d at 524. Additionally, in light of the well-established Supreme Court precedent setting forth the rules governing field and express preemption, the State Courts unreasonably applied the federal

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tests in order to aid the federal government in enforcing its own regulations, and allows state administered tests to be used in the enforcement of federal law. This cooperative arrangement does not disrupt the balance set out in 14 C.F.R. Pt. 121, App. I, § XI.

[23] Given the fact that field and express preemption are readily apparent, it is not necessary to address conflict preemption.

preemption doctrine to the facts in this case. See French, 869 F.2d at 6 (noting in the context of pilot drug testing "it is simply unreasonable to hypothesize that Congress intended a commercial pilot on a Providence-to-Baltimore-to-Miami run to be subject to drug testing, say, in Maryland, but not in Rhode Island or in Florida"). Here, it is unreasonable to conclude that Congress intended Hughes and Cloyd to be subject to different state criminal laws governing blood-alcohol content as the aircraft traveled from Florida to Arizona.

It is important to note that this narrow holding does not preclude a state from pursuing a criminal prosecution where a commercial airline pilot's actions result in actual loss of life, injury, or damage to property. In addition, this decision is limited to the specific facts and circumstances of **[**33]** this case, and thus does not address the question of whether federal law preempts state law in the area of pilot qualification and capacity to operate any aircraft other than regularly scheduled commercial flights operating in interstate commerce. Accordingly, it is hereby

ORDERED that:

(1) The Petitioners Christopher Scott Hughes and Thomas Porter Cloyd's Petition for Writ of Habeas Corpus Under 28 U.S.C. § 2254 is GRANTED;

(2) The State Court shall discharge Christopher Scott Hughes and Thomas Porter Cloyd from the State's custody;

(3) The state criminal proceedings against

Christopher Scott Hughes and Thomas Porter Cloyd are quashed;

(4) The State of Florida is enjoined from taking any further action against **[*1347]** Christopher Scott Hughes and Thomas Porter Cloyd for the actions described in State of Florida v. Christopher Scott Hughes and Thomas Porter Cloyd;

(5) The effect of this Order is stayed for thirty (30) days to permit any appeal; and

(6) This case is CLOSED.

DONE and ORDERED in Miami, Florida, this 5th day of August, 2003.

PATRICIA A. SEITZ

UNITED STATES DISTRICT JUDGE

U.S. Const. art. VI

Clause 2: This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

18 U.S.C. § 341. Definitions

As used in this chapter, the term "common carrier" means a locomotive, a rail carrier, a sleeping car carrier, a bus transporting passengers in interstate commerce, a water common carrier, and an air common carrier.

18 U.S.C. § 342. Operation of a common carrier under the influence of alcohol or drugs

Whoever operates or directs the operation of a common carrier while under the influence of alcohol or any controlled substance(as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)), shall be imprisoned not more than fifteen years or fined under this title, or both.

18 U.S.C. § 343. Presumptions

For purposes of this chapter -

(1) an individual with a blood alcohol content of .10 percent or more shall be presumed to be under the influence of alcohol; and

(2) an individual shall be presumed to be under the influence of drugs if the quantity of the drug in the system of the individual would be sufficient to impair the perception, mental processes, or motor functions of the average individual.

49 U.S.C. § 44701. General requirements

(a) Promoting Safety. - The Administrator of the Federal Aviation Administration shall promote safe flight of civil aircraft in air commerce by prescribing -

(1) minimum standards required in the interest of safety for appliances and for the design, material, construction,

quality of work, and performance of aircraft, aircraft engines, and propellers;

(2) regulations and minimum standards in the interest of safety for -

(A) inspecting, servicing, and overhauling aircraft, aircraft engines, propellers, and appliances;

(B) equipment and facilities for, and the timing and manner of, the inspecting, servicing, and overhauling; and

(C) a qualified private person, instead of an officer or employee of the Administration, to examine and report on the inspecting, servicing, and overhauling;

(3) regulations required in the interest of safety for the reserve supply of aircraft, aircraft engines, propellers, appliances, and aircraft fuel and oil, including the reserve supply of fuel and oil carried in flight;

(4) regulations in the interest of safety for the maximum hours or periods of service of airmen and other employees of air carriers; and

(5) regulations and minimum standards for other practices, methods, and procedure the Administrator finds necessary for safety in air commerce and national security.

(b) Prescribing Minimum Safety Standards. - The Administrator may prescribe minimum safety standards for -

(1) an air carrier to whom a certificate is issued under section 44705 of this title; and

(2) operating an airport serving any passenger operation of air carrier aircraft designed for at least 31 passenger seats.

(c) Reducing and Eliminating Accidents. - The Administrator shall carry out this chapter in a way that best tends to reduce or eliminate the possibility or recurrence of accidents in air transportation. However, the Administrator is not required to give preference either to air transportation or to other air commerce in
carrying out this chapter.

(d) Considerations and Classification of Regulations and Standards. - When prescribing a regulation or standard under

subsection (a) or (b) of this section or any of sections 44702-44716 of this title, the Administrator shall -

(1) consider -

(A) the duty of an air carrier to provide service with the highest possible degree of safety in the public interest; and

(B) differences between air transportation and other air commerce; and

(2) classify a regulation or standard appropriate to the differences between air transportation and other air commerce.

(e) Bilateral Exchanges of Safety Oversight Responsibilities. -

(1) In general. - Notwithstanding the provisions of this chapter, the Administrator, pursuant to Article 83 bis of the Convention on International Civil Aviation and by a bilateral agreement with the aeronautical authorities of another country, may exchange with that country all or part of their respective functions and duties with respect to registered aircraft under the following articles of the Convention: Article 12 (Rules of the Air); Article 31 (Certificates of Airworthiness); or Article 32a (Licenses of Personnel).

(2) Relinquishment and acceptance of responsibility. – The Administrator relinquishes responsibility with respect to the functions and duties transferred by the Administrator as specified in the bilateral agreement, under the Articles listed in paragraph (1) for United States-registered aircraft described in paragraph (4)(A) transferred abroad and accepts responsibility with respect to the functions and duties under those Articles for aircraft registered abroad and described in paragraph (4)(B) that are transferred to the United States.

(3) Conditions. - The Administrator may predicate, in the agreement, the transfer of functions and duties under this subsection on any conditions the Administrator deems necessary and prudent, except that the Administrator may not transfer responsibilities for United States registered aircraft described in paragraph (4)(A) to a country that the

Administrator determines is not in compliance with its obligations under international law for the safety oversight of civil aviation.

(4) Registered aircraft defined. - In this subsection, the term "registered aircraft" means -

(A) aircraft registered in the United States and operated pursuant to an agreement for the lease, charter, or interchange of the aircraft or any similar arrangement by an operator that has its principal place of business or, if it has no such place of business, its permanent residence in another country; and

(B) aircraft registered in a foreign country and operated under an agreement for the lease, charter, or interchange of the aircraft or any similar arrangement by an operator that has its principal place of business or, if it has no such place of business, its permanent residence in the United States.

(f) Exemptions. - The Administrator may grant an exemption from a requirement of a regulation prescribed under subsection (a) or (b) of this section or any of sections 44702-44716 of this title if the Administrator finds the exemption is in the public interest.

49 U.S.C. § 45106.
Relationship to other laws, regulations, standards, and orders

(a) Effect on State and Local Government Laws, Regulations, Standards, or Orders. - A State or local government may not prescribe, issue, or continue in effect a law, regulation, standard, or order that is inconsistent with regulations prescribed under this chapter. However, a regulation prescribed under this chapter does not preempt a State criminal law that imposes sanctions for reckless conduct leading to loss of life, injury, or damage to property.

(b) International Obligations and Foreign Laws. - (1) In prescribing regulations under this chapter, the Administrator of the Federal Aviation Administration -

(A) shall establish only requirements applicable to foreign air carriers that are consistent with international obligations of the United States; and

(B) shall consider applicable laws and regulations of foreign countries.

(2) The Secretaries of State and Transportation jointly shall request the governments of foreign countries that are members of the International Civil Aviation Organization to strengthen and enforce existing standards to prohibit crewmembers in international civil aviation from using alcohol or a controlled substance in violation of law or a United States Government regulation.

(c) Other Regulations Allowed. - This section does not prevent the Administrator from continuing in effect, amending, or further supplementing a regulation prescribed before October 28, 1991, governing the use of alcohol or a controlled substance by airmen, crewmembers, airport security screening employees, air carrier employees responsible for safety-sensitive functions (as decided by the Administrator), or employees of the Administration with responsibility for safety-sensitive functions.

14 C.F.R. pt. 121 App. I

XI. *Preemption.* A. The issuance of 14 CFR parts 65, 121, and 135 by the FAA preempts any state or local law, rule, regulation, order, or standard covering the subject matter of 14 CFR parts 65, 121, and 135, including but not limited to, drug testing of aviation personnel performing safety-sensitive functions.

B. The issuance of 14 CFR parts 65, 121, and 135 does not preempt provisions of state criminal law that impose sanctions for reckless conduct of an individual that leads to actual loss of life, injury, or damage to property whether such provisions apply specifically to aviation employees or generally to the public.

14 C.F.R. pt. 121 App. J

E. *Preemption of State and local laws.*

1. Except as provided in subparagraph 2 of this paragraph, these regulations preempt any State or local law, rule, regulation, or order to the extent that:

(a) Compliance with both the State or local requirement and this appendix is not possible; or

(b) Compliance with the State or local requirement is an obstacle to the accomplishment and execution of any requirement in this appendix.

2. The alcohol misuse requirements of this title shall not be construed to preempt provisions of State criminal law that impose sanctions for reckless conduct leading to actual loss of life, injury, or damage to property, whether the provisions apply specifically to transportation employees or employers or to the general public.

FL Stat. § 316.193 Driving under the influence; penalties.

(1) A person is guilty of the offense of driving under the influence and is subject to punishment as provided in subsection (2) if the person is driving or in actual physical control of a vehicle within this state and:

(a) The person is under the influence of alcoholic beverages, any chemical substance set forth in s. 877.111 or any substance controlled under chapter 893, when affected to the extent that the person's normal faculties are impaired;

(b) The person has a blood-alcohol level of 0.08 or more grams of alcohol per 100 milliliters of blood; or

(c) The person has a breath-alcohol level of 0.08 or more grams of alcohol per 210 liters of breath.

FL Stat. § 860.13 Operation of aircraft while intoxicated or in careless or reckless manner; penalty.

(1) It shall be unlawful for any person:

(a) To operate an aircraft in the air or on the ground or water while under the influence of:

1. Alcoholic beverages;

2. Any substance controlled under chapter 893;

3. Any chemical substance set forth in s.877.111; or

(b) To operate an aircraft in the air or on the ground or water in a careless or reckless manner so as to endanger the life or property of another.

(2) In any prosecution charging careless or reckless operation of aircraft in violation of this section, the court, in determining whether the operation was careless or reckless, shall consider the standards for safe operation of aircraft as prescribed by federal statutes or regulations governing aeronautics.

(3) Violation of this section shall constitute a felony of the third degree, punishable as provided in s.775.082, s. 775.083, or s. 775.084.

(4) It shall be the duty of any court in which there is a conviction for violation of this statute to report such conviction to the Civil Aeronautics Administration for its guidance and information with respect to the pilot's certificate.